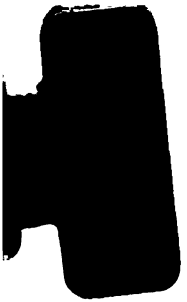

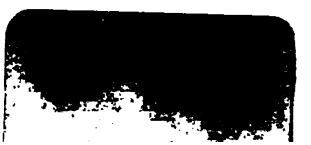

REPORTS OF CASES

RULED AND ADJUDGED

IN THE SEVERAL

COURTS OF THE UNITED STATES

AND OF

PENNSYLVANIA,

HELD AT THE SEAT OF THE FEDERAL GOVERNMENT.

BY A. J. DALLAS

Atque eo magis necessaria est hæc opera, quod et nostro sæculo non desunt, et olim non defuerunt, qui *hanc juris partem* ita contemnerent, quasi nihil ejus præter inane nomen existeret.—GROTIUS.

VOL. II.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

THE BANKS LAW PUBLISHING CO.
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CASES DETERMINED

IN THE

FEDERAL COURT OF APPEALS.

AUGUST SESSION, 1781.

THE RESOLUTION.

MILLER *et al.*, libellants and appellants, *v.* The SHIP RESOLUTION, and INGERSOLL, claimant and appellee.

MILLER *et al.*, libellants and appellees, *v.* The CARGO of the SHIP RESOLUTION, and O'BRIEN, claimant, appellant.

Prize.—Neutral property.—Recaptures.—Illegal contract.—Capitulation.—Allies.

The capture of neutral property, by one of the belligerent parties, and its retention for twenty-four hours, does not vest the property in the captors, so as to render it lawful prize to the other power.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize.

But the possession and occupation of the property, in such case, is evidence of title, which is conclusive upon all mankind, except the rightful owner.

On a surrender, by capitulation, the property of the inhabitants, protected by the articles, is considered neutral; and is not liable to capture by the belligerent, or his allies.

A subject cannot divest himself of the obligation of a citizen, and voluntarily make a contract with the enemy, stipulating to special neutrality; but he may enter into such contract, by capitulation, when it is out of the power of his government to protect him.

The compacts and agreements of allied nations with the common enemy, bind each other, when they tend to the accomplishment of the common object.

The United States, as allies of France, were bound by the capitulation between Great Britain and France, for the surrender of Dominica.

Miller *v.* The Resolution, Bee 404; s. c. 3 Hopk. 70, affirmed as to the ship, and reversed as to the cargo.[1]

THESE were appeals from the Admiralty Court of Pennsylvania, where the ship had been acquitted and the cargo condemned.

---

[1] But see *infra*, p. 19, where the original decree was modified, and the cargo, with the exception of a certain portion thereof, condemned.

The Resolution.

After argument, by *Wilcox*, *Lewis* and *Sergeant*, for the appellants, and *Morris* and *Wilson*, for the appellees, the opinion and judgment of the court (comprising a statement of all the facts and documents material to the case) were delivered by CYRUS GRIFFIN, the presiding Commissioner, in the following terms:

BY THE COURT.—We have considered these appeals, and are now ready to give our judgment.

It has been very truly observed, that this appeal is a case of importance, not only with regard to the subject in contest, but also with regard to the great questions of law, which the investigation and discussion of the merits necessarily introduced; and being before this court for their determination, the judgment and decree of this court must be directed by the resolves and ordinances of congress, and, where they are silent, by the laws, usage and practice of nations. Upon these grounds, the case has been considered and argued by the counsel on both sides; and considered so thoroughly, and argued so copiously, fully and ably, that we have now every possible light of which the subject admits.

*2] *The general question is, "whether, on all the circumstances of this case, the ship or cargo, or both, or any part of the cargo, be a prize; and as such ought to be condemned and confiscated?" The libellants contend, that both ship and cargo are prize—if not the ship, yet the cargo is prize; if not the whole of the cargo, yet the principal part of it must be condemned. Different grounds have been taken to support these several positions—one ground is taken to affect both ship and cargo; other and different grounds, to affect the cargo; other and different grounds, to affect the principal part of it.

The argument directed against both ship and cargo is this: By the law of nations, after a capture and occupation for twenty-four hours, the property captured is transferred to the captors: but the ship and cargo in question were captured and occupied twenty-four hours; therefore, the property was transferred to the captors; and as the captors were British subjects, the property was British property, and therefore, legally attacked and captured by the American privateer Ariel.

There is no doubt, but that a capture, authorised by the rights of war, transfers the property to the captor; but the question is, whether a capture, not authorised by the rights of war, can have that legal operation: for the claimant says, "that the ship was not originally British, but Dutch and neutral property, and that the cargo also was not originally British, but neutral property, in consequence of articles of capitulation, stipulated on the conquest of Dominica, by the arms of his most Christian Majesty."

All the authorities cited on cases of capture authorised by the rights of war, are, where the property captured was the property of an enemy: not an instance has been produced, where a capture, not authorised by the rights of war, has been held to change the property; but many authorities have been brought to show, that no change is effected by such capture. To say, that a capture, which is out of the sanction and protection of the rights of war, can nevertheless derive a validity from the rights of war, is surely a contradiction in terms. The rights of war can only take place among enemies, and therefore, a capture can give no right, unless the property captured be

the property of an enemy. But it is stated, that both ship and cargo, in the present case, were originally (that is antecedently to the British capture) in the predicament of neutral property: no property then was transferred by the capture, and, of consequence, the property in question was not, upon the ground it has been considered, British property.

But it is said, "the fact cannot be ascertained, that the capture in this case was not authorised by the rights of war; for it depends upon the will of the sovereign, whether an outrage, *and capture *supra altum mare*, by his subjects, of the property of subjects of another nation, shall [*3 be an illegal and piratical act, or an act of hostility: that the sovereign is not obliged to promulge his will, on the moment he makes war, and that as the human will has no physical existence, it cannot be ascertained, but by a declaration of it by the sovereign himself, and, therefore, *non constat*, but that the capture in the present case, was authorised by the British crown and so a fair act of hostility, authorised by the rights of war."

This argument is ingenious and plausible, but not solid. As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society, and hence, it is a maxim of the law of nations, founded on every principle of reason, justice and morality, that one nation ought not to do an injury to another. As the natural state (that of nations) is a state of peace and benevolence, nations are morally bound to preserve it. Peace and friendship must always be presumed to subsist among nations; and therefore, he who founds a claim upon the rights of war, must prove that the peace was broken by some national hostility, and war commenced: but mere conjecture, supposition and possibility can render no competent evidence of the fact.

But it is said, "here was a national hostility, viz., the capture by the British privateer; and the act of the subject is the act of the sovereign." The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign to do it: but in this case, there is no evidence that the commission of the British privateer extended to property, under the circumstances of the property captured.

But it is asked, "what private or public mischief can be apprehended from considering property, under the circumstances of this case, as prize: for the wrong was committed by the British privateer, and therefore, the British nation is chargeable with it, and bound to make compensation." We are inclined to think, that were the claimants to apply to the British crown for compensation, they would be told "that although satisfaction were done, yet it would be in proportion only to the wrong done by the British privateer, which consisted only in the seizure and detention. But if compensation was expected for ship and cargo, they must look to that nation for it, whose courts declared a condemnation, and whose subjects reaped the fruits of it."

But it is alleged, that "the late ordinance of congress is express and decided, that after a capture and occupation for twenty-four hours, the property captured shall be prize." The ordinance of congress certainly speaks of a legal capture; to admit a different construction would be a violence both to the *terms and spirit or intention of it. Prize is [*4 generally used as a technical term, to express a legal capture; and congress having adopted it, in framing of the ordinance, the general sense

or acceptation of it, must determine its import and signification. But, suppose, the term *prize* merely imported a capture, without any reference to its legality, and that it was the spirit and intention of the ordinance, to subject to *prize* all captures, both legal and illegal, after twenty-four hours; it does not follow, that it would affect the present case. The municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation; and by the law of nations, a neutral subject, whose property has been illegally captured, may pursue and recover that property, in whatever country it is found, unless a competent jurisdiction has adjudged it prize. The municipal laws of a country can only bind its own subjects.

The ordinance of congress is, in truth, a new regulation of the *jus post liminii*, and limits it to a recapture within twenty-four hours, and therefore, can only relate to the subjects of the United States: it adopts the ordinance of France, and that ordinance relates only to the subjects of France. In both cases, with regard to the owner, a subject, the property captured is not passed away, before the expiration of twenty-four hours. But, put the case of a capture and the sale of it, before twenty-four hours, to a neutral subject; the sale is certainly good and conclusive upon the owner; for the question must be decided by the law of nations, and by the law of nations, the property captured is transferred to the captor, as soon as it is taken. Both the ordinances, therefore, of congress and of France, in our opinion, relate only to property captured from a subject and re-captured; and not to property captured from a neutral and re-captured.

It is said, "that arguments drawn from the law of nations with regard to pirates, do not apply to the present case, because pirates have not the rights of war." If the principal fact was properly attended to, the present case could not be questioned. Whence is it, that pirates have not the rights of war? Is it not, because they act without authority and commission from their sovereign? And is it not objected and proved, that the British privateer, with regard to the property captured, acted without commission and authority from the British crown? So far from there being any dissimilarity in the cases, it is, in fact, the very case in judgment, considering it on the first ground of argument.

But it is alleged, "that the capture by the British privateer must be considered as legal: for, after a capture and occupation for twenty-four hours, the legality of the capture is not open for question and examination."

*5] *This doctrine must never be suffered; there is no example or precedent for it to be found in any of our books; it breaks down and destroys the distinction between right and wrong; it gives a sanction to injustice, robbery and piracy, and it is reprobated by the laws, usage and practice of nations. Lord Mansfield, in the case so often quoted (*Goss* v. *Withers*), 2 Burr. 693, says, "The question, whether the property is transferred by the capture, can only happen between the owner and vendee, and between the owner and the re-captor." But the question could never happen between the owner and the re-captor, if the legality of the capture was not examinable on every libel for condemnation as prize. The question is—*prize or no prize?* This is, whether the capture be legal or not.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize; then, and not before, all further questions and

examinations are precluded; then, all parties, and all foreign courts, are estopped to say, "the capture is not legal;" and if the decree be erroneous or iniquitous, the party injured must apply for redress to that nation, whose courts have committed the error or inquity.

"Great difficulties," it is said, "will arise, if capture and occupation for twenty-four hours should not be considered as conclusive evidence of property in the captor, and that the capture was legal." And it is asked, "must a regular title be deduced from the first proprietor to the captor, as in case of an ejectment at the common law?" And "must common-law strictness, in making out titles, be adopted in admiralty courts?"

Every libel states a title to the thing captured; the title must not only be stated, but it must also be proved. It is stated in the libel, in this case, that the property captured was British property, and the evidence to prove it is, "possession and occupation of it by the British privateer." A title thus traced, is a good one, in a court of common law, except in a single case: it is a good title against all the world, *except the right owner*. This exception is founded on every principle of reason and justice; it ought not only to be adopted in courts of common law, but in every court, where the distinction between right and wrong is preserved, and justice regarded. Possession and occupation ought, upon a question of property, to have the same influence in courts of admiralty, as in courts of common law; it ought to be considered as a good title, and conclusive upon all mankind, except the *right owner*. Such a title is clear of all difficulties in the proof of it; it excludes the necessity of a regular deduction of title from the first proprietor down to the captor; it is disengaged from those entanglements, which result from a variety of possible changes and mutations of the *property; and it cannot be shaken, except when every honest man will say, it [*6 ought to be shaken—when the right owner appears and proves his property. We have now done with the observations and reasoning, that relate to the first ground of argument: and are of opinion, that if the ship and cargo were originally neutral property, the capture and occupation for twenty-four hours did not change it into British property, and make it prize.

But another ground has been taken, to affect the cargo: The libellants say, "that the cargo is the produce and growth of Dominica; that the said cargo is the property of British subjects of that island; that therefore, it was not neutral property, but British, and originally prize." To this the claimants reply, "that after the declaration of independence, and after the alliance of the States with France, the British Island of Dominica was taken by the arms of his most Christian Majesty; that before the reduction of it, articles of capitulation took place, by which the owners and possessors of estates in the island were secured in the possession and enjoyment of them, and indulged with carrying on trade and commerce, upon an equal footing with subjects of France; that the said island, since the conquest, has been under the protection and government of France; that before the sailing of the ship, a passport was obtained from the French government, requiring all commanders of French armed vessels, and all commanders of Spanish and American armed vessels, the allies of France, not to impede or obstruct the passage of said ship, the cargo on board being property of capitulants; that the said articles of capitulation bind America, as the ally of France; that, therefore, the cargo, although the property of British subjects, yet it is

British property, protected from capture, by the articles of capitulation; and that it is in the predicament of neutral property, and therefore, was not originally prize."

Upon these facts and allegations two capital questions arise:—1st. Whether the cargo was British property, protected by the articles of capitulation against French and British captures? 2d. Whether America, as the ally of France, is bound by the articles of capitulation?

With regard to the first question, it is contended, on a variety of grounds, that this cargo is not protected from capture by the articles of capitulation.

1. Because the capitulation does not extend to property shipped and on passage at sea.

2. Because the owners were principally non-residents, at the time of capitulation, and therefore, although owning estates at Dominica, cannot be considered as capitulants.

*7] *3. Because the proceeds of this cargo were to be remitted from Holland, to the owners residents in Great Britain.

4. Because the voyage was in fact calculated for Great Britain and for Amsterdam, in Holland, and therein was a breach of the articles of capitulation, and a forfeiture of its protection.

5. Because the cargo on board was the property of British subjects, not residents, nor owning estates, in Dominica, and therefore, not within the protection of the capitulation.

The first, fourth and fifth grounds apply to the whole cargo, and the second and third to the principal part of it.

Whether the articles of capitulation extend protection to property, after being shipped and on its passage at sea, depends on the 13th article, and the general tendency and scope of the capitulation itself. The main design of the capitulants was, to obtain a perfect security for their estates and property; and a full exercise of all the rights of property and ownership: and one great object with the French general was, to secure to France the commerce of the island, and all its advantages, emoluments and revenues; but it was inconsistent with the design and object which both had in view, to open to French and British capture, the produce of the island, and property of the capitulants, as soon as afloat at sea. This would have injured the rights of property, discouraged the labor and agriculture of the island, lessened its exports, and diminished the revenues of its government.

But the thirteenth article seems decisive: it stipulates, "that the merchants and inhabitants of this island, included in the present capitulation, shall enjoy all the privileges of trade, and on the same conditions as are granted to the subjects of his most Christian Majesty, throughout the extent of his dominions." By this article, the capitulants are placed, with regard to their trade and commerce, on an equal footing with the subjects of France; every commercial privilege which the subjects of France enjoy, is conceded to the capitulants; but it is certainly one privilege which a subject of France enjoys, that his property at sea, in the line of a fair trade and commerce, shall not be captured as prize, by French subjects; consequently, the cargo, in this case, which is the property of capitulants, cannot be subject as prize to French captures.

But it is asked, "was it not subject to British capture?" The article, it

is said, stipulates, that the trade shall be carried on upon the like condition with the French trade, and the French trade is subject to interruption by British capture. Had the capitulation stipulated, generally, that the capitulants should exercise all the rights and privileges of trade exercised by *the subjects of France, the case would have been a clear one; the capitulation then might have been fairly considered as a compact between the French and British crowns, that a trade should have been carried on by the capitulants, in the extent of the French trades, and consequently, that neither crown could interrupt it by captures, without a breach of faith. The difficulty arises upon the provision in the article, that the privileges of trade shall be considered upon the conditions of the French trade, which it is said implies, "that as the French trade is exposed to British captures, so must be the trade of the capitulants." It is observable, that this article is propounded on the part of the capitulants, and the conditions stipulated must have been, in their ideas, productive of some benefit and advantage: Was it for the benefit and advantage of the capitulants, that their property, so captured, should become the property of the captors, and liable to confiscation? Certainly not. [*8

But admit, that this article was propounded on the part of the French general; what beneficial object could he have in stipulating, that this trade should be exposed to British capture? Was it for the interest and advantage of the French crown, that this fresh accession to its commerce should be harassed and discouraged by British capture? Certainly not. A construction then so pointedly against the interest of both parties can never be the right one: the truth is, the condition expressed in the article refers only to the duties, imposts and regulations of commerce.

But if the construction was admissible, that it was for the interest of the British capitulants, that this trade should be liable to such interruption by British captures, what must we think of the opinion of the eminent lawyers of Great Britain which have been cited? They say, that this trade is protected by the capitulation against British captures. Deciding, then, against the contended interest of the capitulants, do not their opinions, from such a circumstance, acquire a great additional force? The British crown, by its proclamation, gives incontestable evidence, that the property of the capitulants is not exposed to British capture; for it refers to the capitulation, asserts the protection it gives, and confirms it.

With regard then to the question, "whether the capitulation extends protection to property, when shipped from the island, and afloat at sea?" we are of opinion, that it does.

But it is objected, on the second ground of argument, that the cargo was principally the property of residents in Great Britain at the time of the capitulation, and therefore, although owning estates in the island, yet not entitled to the benefit of the capitulation.

*It will be proper, in the consideration of this objection, to attend to the 9th, 12th and 13th articles of capitulation. [*9

The 9th article says: "The absent inhabitants, and such as are in the service of Great Britain, shall be maintained in the possession and enjoyment of their estates; which shall be managed for them, by their attorneys." The 12th article says: "That widows and other inhabitants, who, through illness, absence or any other impediment, cannot immediately sign the capit-

ulation, shall have a limited time to accede to it." And the 13th article says: "The inhabitants and merchants of this island, included within the present capitulation, shall enjoy all the privileges," &c.

The fact is admitted, that the cargo is the produce and growth of Dominica, and that the principal part of it belongs to British subjects; possessing estates in the island, but non-residents at the time of the capitulation. It is objected, "that with regard to such non-residents, the operation of the 9th article extends no further than to protect the estates of such persons from seizure and confiscation by the rights of conquest; that the 12th article extends only to those who have acceded to the capitulation, within the time limited, and that the 13th article extends only to such inhabitants and merchants as are included at the time of capitulation, and not to non-residents. To this, it is replied, "that by the 12th article, absentees may come in, within a limited time, and accede to the capitulation, and that then they fall within the description of the 13th article, which says, "the inhabitants and merchants of this island, included within the capitulation, &c."

Upon these allegations and facts, two questions arise: 1st. Whether the claimants, who were non-residents and absentees, at the time of capitulation, have acceded to it? 2d. Whether, having acceded to it, they come within the description of the 13th article, and are entitled to the rights and privileges of trade there conceded?

We have carefully examined all the bills of lading and the depositions annexed, and find that the property mentioned in each bill is proved, by the respective depositions, to be the property of a British capitulant. Whether he, personally, or by attorney, representatively, subscribed the capitulation, does not appear; nor do we think it material, for the maxim is a true one, *qui facit per alium, facit per se.* It is proved by the deposition of Mr. Fitzgerald, that the general sense and opinion of the people of the island, the subscription of an attorney, for his principal was sufficient, and Mr. Fitzgerald mentions an instance, where a principal was refused by *the French governor the benefit of the capitulation, because his attorney had neglected to subscribe for him. He also proves, that it was the uniform and uninterrupted practice of the island, for principals, non-residents, to subscribe by attorney; which would not have been the case, unless such mode had been agreeable to the spirit and intention of the capitulation.

*10]

But it is said, "that none could accede to this capitulation, but such as were in a capacity to stipulate a neutrality, and that non-residents, in Great Britain, although owning estates in Dominica, could not, consistently with their allegiance, engage a neutrality of conduct." It must be admitted, that where the supreme authority is competent to protect the rights of subjects, a subject cannot divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a neutrality of conduct; but, certainly, he may enter into such an agreement, when it is no longer able to give him protection. In the present case, the British crown was not able to secure to the owners their estates in Dominica, and therefore, they had a natural right to make the best terms they could, for the preservation of their property; for, it is a general maxim of the law of nations, "that although a private compact with an enemy may be prejudicial to a state in some degree, yet if it tends to avoid a greater evil, it shall bind the states, and ought to be considered as a public good." The owners, therefore,

of the cargo in question, though non-residents, at the time of the capitulation, and out of the reach of personal injury, yet having estates in the island, in danger of confiscation by conquest, had a right to avail themselves of the terms proffered by the capitulation, and engage a neutrality of conduct, by acceding to it.

But it is said, "that, very possibly, some of these non-residents are at this day in the military service of Great Britain." Our opinion is, that the 9th article, with regard to all absentees, and such as are in the service of Great Britain, only exempted their estates from forfeiture by the rights of conquest. The rights and privileges of trade are considered only by the 13th article. No one can bring himself within the 13th article, that has not signed the capitulation, and every one who signs the capitulation engages a neutrality of conduct. If any one subscribing the capitulation should afterwards go into the service of Great Britain and commit acts of hostility against France and America, he would break his engagement of neutrality, and forfeit all the rights and privileges of trade, and his property captured at sea would become prize.

It is a rational construction, to consider neutrality as the great basis of the capitulation. The estates, indeed, of absentees, and such as were engaged in the service of Great Britain, appear to *have been secured, at all events, from forfeiture, without a stipulation for neutrality; [*11 but with regard to the rights and privileges of trade, they can be only exercised by those who have acceded to the capitulation and engaged a neutrality. Admitting, then, that the owners of estates in the Island of Dominica, and non-residents and claimants in the cause, have properly acceded to the capitulation; the mere question is, whether they come within the 13th article, and are entitled to the rights and privileges of trade there conceded? As we conceive that this article was conceded as a liberal compensation for the stipulation of neutrality, we have no doubt, but that these non-residents, who owned estates in Dominica, and have acceded to the capitulation and neutrality, come within the description of the 13th article, and are entitled to all the rights and privileges of trade, which it provides for and stipulates.

The third ground of argument, on which it is contended, that this cargo is not protected by the capitulation against capture, is this: that the proceeds of the cargo were to be principally remitted to Great Britain, on the order of the owners resident there, and therefore, that this cargo was in a line of trade, not within the protection of the capitulation. We have already given it as our opinion, that the 13th article gives the capitulants a protected trade to every port, where the trade and commerce of France extends. And we have given it as our opinion, that with regard to the rights and privileges of trade, there is no difference between the inhabitants, and those absentees, non-residents, who have acceded to the capitulation and neutrality. The only circumstance, then, to take this cargo out of the protection of the capitulation, must be the letters of advice of the agents at Dominica, advising the consignees at Amsterdam, to whom the cargo belonged, and that the proceeds of the principal part of it were to be at the disposal and order of the owners, residents in Great Britain. We cannot see the force of this circumstance in the extent contended for, if the agents rightfully exported the produce of the estates of those non-residents, in conformity to the capitulation. The letters of advice cannot give this commercial act a different com-

plexion; the agents could not ship this property, in their own right, without taking upon themselves a risk of the voyage; and the bills of lading necessarily allowed that the proceeds were at the disposal of the owners. Could agents have acted with more propriety? Every step they took was the natural result of the rights of trade conceded by the capitulation.

But it is objected, "that the 20th article shows, that no remittance was to be made, but for education and support of children." The article is this: "The inhabitants of the island shall have liberty to send their children to England, to be there educated, *and to send them back again, and to make remittances to them, while in England." This article by no means proves, that no remittances were to be made of proceeds on sales in a neutral country; though the children might have had remittances in that train of intercourse, yet the mode might have been thought too circuitous and dilatory. A remittance in a direct line was more eligible. Besides, remittances on sales abroad could only be in money or bills; but by this article, there is no limitation of the species of remittance, and it may be in produce.

*12]

The capitulation must receive a liberal construction. It was the fabric of a great, enlightened general, and every part of the structure exhibits a liberality and grandeur of spirit, that does honor to human nature. It is said, that if the property of the capitulants is thus protected from capture, it is in a better situation than French, American or British property; it is precisely in the situation of neutral property. It was far from being the wish of the capitulants, to have had their property placed in such a predicament, upon the terms it was done. They were reduced and obliged to submit to it, by force of arms. But the situation of those people is mentioned as a happy one: if to be a conquered people, and enforced to all the contingent consequences of a conquest, be a pleasing condition, these people may then boast of their being in an happy one.

It is said, the British crown must be benefited by this condition of their subjects. The British crown may indeed be benefited in some degree; it was not meant to deprive Great Britain of every benefit; she draws some benefit, from having a few remittances made from sales abroad, to a few of her subjects in England, owning estates in Dominica. But then to gain the advantage, she yields up the personal service of those subjects, for they are bound to observe a neutrality. But has Great Britain lost nothing by the conquest? Who possesses the Island of Dominica? Who possesses all the advantages and benefits of its trade? Who has obtained its commercial revenues? It is true, she is not at the expense of the government of that island. But it is true, she has lost island, government and revenues. When the consignees disposed of the cargo, they became debtors for the moneys received. The making of remittances, in satisfaction of debts, although to subjects of a nation at war, is no violation of the duties of a citizen. Nor will the usage and practice of civilized nations forbid it. Tobacco shipped to France, with an avowed intent to remit the proceeds to England for the payment of debts, would not be prize on an American capture.

We come now to the fourth ground of argument, on which it *is contended, that this cargo is not within the protection of the articles of capitulation; that is, that the voyage was calculated for Great Britain, and not for Amsterdam, in Holland, and therefore, in breach and out of the protection of the capitulation. This argument is grounded upon several cir-

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cumstances, and upon evidence that point at some latent object, but do not speak decisively upon it: they prove a secrecy and concealment, with regard to the voyage to Dominica, and the taking a cargo there; but all these circumstances are easily explained, without adopting the idea that the voyage was intended for Great Britain. What is suggested in Capt. Waterburgh's letter, was a mere precautionary measure, to avoid British cruisers, that perpetually harassed the Dutch trade, by capturing their vessels. In the same letter, he mentions the capture of a Holland ship, which had been carried into St. Kitts and released; the letter is dated Eustatius; and the manœuvres he mentioned were to secure the voyage to Dominica.

The voyage from Dominica to Amsterdam, we have no doubt, was planned in London, between the capitulants there, owning estates in Dominica, and Daniel Heshuysen, agent for Brantlight & Son. The letter addressed to Moreson, at Dominica, was dated at Amsterdam, though written in London, because Brantlight & Son lived at Amsterdam, and because the cargo was to be consigned to them, at Amsterdam, and it was dated the day of the date of his own letter, which inclosed it, because it was then written. As for the secrecy enjoined in Brantlight & Son's letter to Captain Waterburgh, while at Eustatius, with regard to the voyage to Dominica; and the taking a cargo there, we cannot think they had any other motive for it, than such as often influences merchants, in the conduct of a fair trade, to keep to themselves their commercial plans. But what force can these circumstances have, when opposed by the positive evidence that is produced? The bill of lading, and a variety of letters from the shippers and attorneys for the owners in London, some addressed to Brantlight & Son, and others to the owners, prove that the voyage was for Amsterdam; all the ship-papers also prove it. But the depositions of Waterburgh and Moreson, to whom the ship was consigned, and by whom the ship was loaded, are conclusive: they, upon clearing out of the ship, swear expressly that she was destined for Amsterdam.

We are now come to the last ground, which has been taken to prove the cargo not to be protected by the articles of capitulation, which is: That the property of the cargo on board, was the property of British subjects not residents or owning estates in Dominica. But what is the evidence produced to prove this? It is a letter from Moreson to Brantlight & Son, in which he mentions the alarm occasioned by the rupture between Great Britain and the States General, and the fears and *apprehensions the merchants and shippers were under, relative to putting property on [*14 board a Holland vessel; he afterwards mentions the arrival of the king's proclamation, protecting Holland vessels from capture, and says "even then, no one but Mr. Kender Mason and myself would put a hogshead on board your ship, as the king's proclamation laid so much blame on your city; but we have agreed, &c.;" and then says, they have agreed to ship, and assigns the reasons.

The fact does not appear, that Kender Mason had any property at all in Dominica, nor that he had any attorney or agent; it appears, he lived in London, and was a correspondent of Moreson's house, in Dominica. It appears, Daniel Hesuysen, as agent for Brantlight & Son, obtained a letter from this Kender Mason, addressed to Moreson, which he inclosed to Captain Waterburgh, at St. Eustatius, and in consequence of which, Captain Water

burgh was ordered to Dominica. This letter was probably delivered by Waterburgh, as it is not to be found among the ship's papers. We have no evidence of the contents of this letter, but it appears to us, to have been a letter recommending Brantlight & Son to Moreson's house. The plan of the voyage being settled in London, it was natural, to obtain letters of introduction from thence.

But Moreson's letter, it is objected, speaks expressly of Kender Mason having shipped property on board, and there is no proof that he is a British capitulant, and therefore, here was property on board belonging to a British subject, who was neither a resident in Dominica, nor an owner of estate there, and consequently, it was British property, not protected by the capitulation. Moreson's letter, if good evidence, to prove the fact with regard to Kender Mason, must be taken as good evidence to prove every fact stated in it; for it must be taken altogether and admitted, or rejected *in toto*. He says, then, "no one but Kender Mason and myself would put a hogshead on board, &c." Moreson, then, as well as Kender Mason, had property on board. Moreson also mentions in his letter, that afterwards, there was an agreement to ship, generally, and assigns the reasons. The shippers must be other persons besides Mason and Moreson: so that even upon the evidence of Moreson's letter, Kender Mason could have but a part of the cargo, the *quantum* of which is not at all ascertained.

But we are inclined to think, that this letter of Moreson's, with regard to Kender Mason shipping property on board, is a mistake. Kender Mason was certainly not at Dominica, and yet the letter conveys that idea: "A general panic had seized the merchants, they would not ship, until the arrival of the king's proclamation, and even then Kender Mason and myself were the only persons who would ship a hogshead." The person Moreson *15] *meant to speak of, must have been on the spot. He was one whom the panic had not taken hold of; he was one who, with Moreson, took the resolution to ship, notwithstanding the alarming rupture between Great Britain and the States General; he was one who was led to ship from a confidence in the king's proclamation. We have it in evidence, that Captain Waterburgh had letters of recommendation both to Moreson and a Mr. Alexander Henderson. These letters were inclosed to the captain, in a letter from Brantlight & Sons. It appears, that on the captain's application to Moreson, nothing could be done, without Henderson; Moreson and Henderson were the persons who were consulted, and the first who moved to provide a loading for the ship. It appears from the bills of lading, that Henderson was a principal shipper. These circumstances considered, the supposition which was made by the counsel for the claimants, is not altogether without foundation, that Kender Mason, was by mistake, inserted for Henderson.

But, be the fact as it may, we must determine according to the weight of evidence. The bills of lading show, that Kender Mason had no property on board; for every bill mentions the person to whom the property belongs, and each bill has a deposition annexed to it, proving the property mentioned to be the property of the persons mentioned, and it appears, that there was no other property than what was mentioned in the bills of lading, and nowhere in those bills is the name of Kender Mason to be found. To say, then, that Kender Mason had property on board, is to say, that upwards of twenty

persons have committed perjury, for there is that number of bills of lading and depositions: A mere assertion in a letter can never be suffered to weigh down such a powerful combination of positive proof, on oath.

Having now considered all the grounds, on which it was objected that the cargo was, in this case, not protected by the articles of capitulation, we are of opinion, that this cargo was protected by the articles against al French and British captures, and if America is bound by the articles, protected also from American captures. But the question is, whether the articles of capitulation bind America? Vattel, a celebrated writer on the laws of nations, says, "when two nations make war a common cause, they act as one body, and the war is called a society of war; they are so clearly and intimately connected, that the *jus postliminii* takes place among them, as among fellow-subjects." It appears from the established form of ransom bills, that a compact of that nature binds the ally, and it appears by the passport granted by the French governor of Dominica, that he considers the capitulation as obligatory upon America; for he requires all commanders of French vessels, and all commanders *of Spanish vessels, and American vessels, the allies of France, not to impede the navigation [*16 of said ship, in her passage to Amsterdam; for that the shippers of the cargo were capitulants, under the protection of the French crown. From the very nature of the connection between allies, their compacts and agreements with the common enemy must bind each other, when they tend to accomplish the objects of the allies. Both nations have one common interest and one common object. If such agreements, when correspondent to the terms upon which the alliance is formed, and calculated for the attainment of the views and designs which gave birth to it, do not bind the ally, then the consequence would be, that the ally would reap all the fruit and advantages of the compact, without being subject to the terms and conditions of it; while the enemy with whom the compact is made, is exposed, with regard to the ally, to all the disadvantages of it, without participating of all the benefits stipulated; an inequality of obligation reprobated by every principle of reason and justice.

If America is not bound by the capitulation, then it can give no security to the capitulants, nor can they, with safety, exercise the rights and privileges of trade conceded to them. America being in alliance with France, the ports of France are open to our armed vessels; and an American privateer might post herself in the ports of Dominica, watch the sailing of the ships from that port, pursue and capture them. Under such circumstances, the trade and commerce of the island would be totally annihilated. But not only the capitulants would suffer; France would equally suffer; for, if exportation ceases, the commercial revenue of the island must cease with it.

The conquest of Dominica was productive of great advantages to the common cause. It was a considerable reduction of the power and resources of Great Britain; it placed a great body of her subjects in a state of neutrality; it lessened the commerce and revenues of her government, and eventually deprives her of a part of her dominions.

But if America is not bound by the capitulation, neither can the capitulants be bound with regard to America; for no engagement can be a valid one, which ties up the hands of one party, and leaves the other party at full liberty to exercise, on the party bound, all the rights of war. Then, what

should we think of the French governor of Dominica, were he to suffer the capitulants to fit out armed vessels, to cruise against America. But it is said, that the capitulation, so far as it is contended to bind America, is unequal; for American property exported from Dominica would be liable to British capture, which British property would not.

*17] *This argument is not a fair one; it blends together what ought to be distinguished; a difference ought to be observed between the property of British subjects and British capitulants. British subjects, not capitulants, may rightfully capture American property: Americans may rightfully capture their property; but British capitulants cannot capture American property; and therefore, it is a perfect equality, that Americans shall not capture the property of capitulants.

But it is thought strange, that while French, Spanish, American and British property should be liable to capture, the property of the capitulants should be exempted from it. Let us advert for a moment to the peculiar situation of those capitulants. They are a conquered people, and reduced to the government of France; they are, by compact, a neutral body; they have neither the power of war nor peace; they commit hostilities against no nation; neither against France, nor Spain, nor America, nor Britain; where then is the strangeness in the doctrine, that the property of a people thus reduced, thus defenceless, and thus acting in the line of neutrality, should be protected from capture?

But the resolutions of congress with regard to Bermudas and other islands, have been objected, and it is said, that Count d'Estaing captured the vessels belonging to those islands, though, by the resolve of congress, they were exempted from capture; which, it is contended, shows that the agreement of one ally does not bind the other. The resolutions of congress cannot be considered as a compact with the people of Bermudas and the other islands; for those people were not in a capacity to make a compact; they were under subjection to the British Crown, and had no authority from the crown to enter into engagements with America. The resolutions, therefore, of congress were a mere voluntary suspension of the rights of war, with regard to those people, the continuance of which was perfectly optional with America.

If France was bound by these resolutions of congress, she would only be bound in the extent that America was. America might say, when she pleased, that those resolutions should not exist, and so might France. But if France was bound to a neutrality with regard to Bermudas and those other islands; then Bermudas and those other islands were bound to a neutrality with regard to France: but those islands were not bound, therefore, France was not bound; and Count d'Estaing was well justified in the captures he made.

With regard then to the question, "whether the articles of capitulation bind America," we are of opinion, that they do.

*18] *But the claimants take a ground which, they say, will save the cargo at all events; and this ground is the ordinance of congress, which relates to the rights of neutrality. Congress, October 1786, taking into consideration the declaration of her Imperial Majesty of Russia, with regard to the rights of neutrality, adopt the principles of the declaration,

and appoint a committee to report resolutions conformable to them. Resolutions are reported, and on the 7th of April 1781, before the capture in the present case, congress pass an ordinance ascertaining a set of instructions for commanders of armed vessels, the 3d and 4th of which are as follows: 3d. "You shall permit all neutral vessels freely to navigate on the high seas or coast of America, except such as are employed in carrying contraband goods, or soldiers, to the enemies of these United States." 4th. "You shall not seize or capture effects belonging to the subjects of the belligerent powers on board of neutral vessels, excepting contraband goods, &c."

Great Britain, before the capture, had commenced hostilities against the States General; but, by proclamation, exempted from capture, for a limited time, all ships and vessels belonging to the States General of the United Provinces, carrying the produce or manufactures of Dominica, according to the articles of capitulation. The ship in this case was the property of Brantlight & Son, subjects of the States General, carrying the produce of Dominica, according to the capitulation. She was captured by a British privateer, within the limited time; and on a supposition that America is not bound by the articles of capitulation, her cargo was the property of British subjects at war with America. This case comes expressly within the fourth instruction; the ship is certainly within the predicament of neutral property, and the cargo is the property of subjects of a belligerent power.

But it is said, that the rights of neutrality were broken by the British capture. The British capture was illegal; it was without authority from the British crown. It was directly against the articles of capitulation, and in opposition to the British proclamation; it was a piratical act, in legal strictness, and only excusable on the circumstances of the case. But shall America violate rights of neutrality, because another nation has done it? Or, which is the present case, because a subject, without authority from his nation, has done it? Did the ship cease to be a neutral ship by the capture, and did the cargo cease to be British property? If not; then, at the time of the re-capture, the ship was a neutral ship, and the cargo, effects belonging to the subjects of a belligerent power, and so expressly within the 4th instruction.

But it is objected, "that Great Britain has not acceded to the rights of *neutrality, and therefore, the property on board a neutral vessel ought not to be protected." The ordinance of congress makes no [*19 exception of Great Britain; for it says, you shall not seize or capture effects belonging to the belligerent powers, on board of neutral vessels. Great Britain is here beyond a doubt comprehended; for she was a belligerent power, when the ordinance passed.

But it is said, this ordinance of congress is obligatory only on commanders of vessels, but not in the courts of admiralty and appeal. We cannot think that this objection was seriously made. Upon the whole, we are of opinion, that the decree below with regard to the ship, be confirmed; and with regard to the cargo, that it be reversed, and the cargo be charged with the stipulated freight.[1]

[1] This decree was modified, on a rehearing, *infra*, except as to a portion of the cargo; the residue being condemned.

DECEMBER SESSION, 1781.

THE RESOLUTION.

MILLER *v.* The SHIP RESOLUTION, &c.

The SAME *v.* The CARGO of the SHIP RESOLUTION, &c.

Rehearing.—Evidence, in case of prize.—Neutrality.

A rehearing may be granted in a case of prize, where the original decree has not been carried into execution: under what circumstances, it will be granted or refused.

The burden of proving a capture to be lawful prize, lies in the captors; the claimants are not, in the first instance, required to disprove it.

In a prize cause, the ship's papers are *primâ facie*, but not conclusive evidence of the national character of the property.

Though Great Britain, after the commencement of hostilities against Holland, declared by proclamation, that Dutch vessels carrying the produce or manufactures of Dominica, should be exempt from capture, for a limited time, this could only operate against British captures; it did not restore the neutrality of Holland, nor take away the rights of war, in favor of other nations, who should retake a Dutch vessel from a British privateer.

ON motion of *Wilson*, for the appellants, a rule had been granted, in September session last, to show cause why there should not be a rehearing in these appeals: 1st, because the decree had erred in fact; and 2d, because there had been a discovery of material testimony since it was pronounced. And it was argued, on the 26th December 1781, by *Morris*, in support of the rule, and by *Serjeant* and *Wilcocks*, in opposition to it.

In *support* of the rule, it was said, that the rehearing ought to be allowed, on the principle that *humanum est errare;* and by analogy to the practice of the court of chancery, founded on that principle. It is true, that the interest of the community requires, that there should be an end to controversies; but this must be attended to, consistently with doing justice. A rehearing of the chancellor's decree seems, indeed, to be a matter of course, on application, for that purpose, by any two counsel of respectable character. Bohun's Cur. Can. 240, 243, 364, 385, 405. The petition for a rehearing was filed, as soon as information of the decree was received: there has, therefore, been no *laches* *in making the application; and even when the chancellor has made his final decree, the form of petition merely states that he has erred in conscience, as to the facts; and the application is seldom refused. But though the request of counsel should not, of itself, be deemed sufficient, the discovery of new evidence subsequently to the decree, ought to be admitted as a foundation for a rehearing. By this evidence, it will appear, that other vessels, though really British, have been fitted out by the same parties, under the same cover; and, of consequence, the inference will be strong, that the Resolution was also British property.

*20]

In *opposition* to the rule, it was observed, that the most pernicious consequences would ensue, if a new trial should be granted, upon every request, and that the payment of costs will not be a sufficient check; as the advantage of having the property in hand, more than compensates that inconvenience. But in answering the causes assigned for a rehearing, it was contended, that the law of chancery did not apply. In chancery, the suits being

new, and the parties liable to surprise, rehearings are frequently allowed; but in the House of Lords, a rehearing is never allowed. Nor is it consonant with the practice of this court; though if the court was itself dissatisfied with the principles of the decree, that would, undoubtedly, be a satisfactory reason for the measure. Besides, on a rehearing in chancery, no new evidence can be introduced; and the petition for a rehearing must state the reasons at large. 2 Prec. Ch. 450; Ibid. 10. But this application is in the nature of a bill of review, and must, consequently, state new evidence. Ibid. 40, 452; 3 Black. Com. 451; 3 Atk. 35; 3 P. Wms. 371, 372. Nor is the new evidence, which is assigned as another cause for a rehearing, admissible: it respects another vessel; and the papers found on board the ship herself must be the ground of acquittal or condemnation.

By the Court.—As the original decree has not been carried into execution, we think it proper, under the peculiar circumstances of the present case, to allow a rehearing. But this is not to be drawn into precedent; nor is any point, previously determined, to be brought again into litigation, unless the state of the facts respecting it, shall be altered by the new evidence.

The causes were, accordingly, argued for several successive days; and on the 24th of January 1782, the following revisionary decree (altering the suspended decree only as to a part of the cargo) was delivered by William Paca and Cyrus Griffin, the presiding commissioners.

By the Court.—We have considered the new evidence *which has been laid before us, and we have also considered the observations and arguments which the counsel upon both sides have made upon it. [*21

On the first argument, we were of opinion, that the ship ought to be considered in the predicament of neutral property, and entitled to all the rights and privileges of neutrality, which the ordinance of congress ascertained and conferred; we took up this idea, from a construction of the articles of capitulation and the British proclamation, which issued immediately on the rupture between Great Britain and the States General, and which protected the ship Resolution, for a limited time, from British capture, on her passage from Dominica to Amsterdam. We conceived, that the neutrality of the States General, with regard to the ship, abstractedly considered, was not broken by the rupture; the proclamation having controlled the extent of the war, by its exemption of the ship from being a subject of hostility and capture.

Such was our opinion, on the first argument: but on consideration of the last argument, we are of a different opinion.

The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility: The imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals. Before Great Britain commenced war with the States General, the states were a neutral nation with regard to the war between Great Britain, France, Spain and America: They had taken no part in the war, and were a common friend to all. This is precisely the legal idea of a neutral nation: it implies two nations at war,

and a third in friendship with both. The war which Great Britain commenced with the States General was a perfect war: it destroyed the national peace of the States General, and with it, the neutrality of the nation. The States became a party in the general war against Britain: they were no longer a common friend to the belligerent powers; and therefore, they ceased to be a neutral nation.

War having thus destroyed the neutrality of the States General, they can never resume the character of a neutral, until they are in circumstances to resume the character of a common friend to Great Britain, France, Spain and America: But this character is not to be acquired, while war subsists between them and Great Britain. Only a peace, therefore, between Britain and the States, can put the States in a capacity to resume their original character of neutrality. But there can be no peace, without the concurrence of both nations: the British could not, therefore, by *the mere authority of their proclamation, restore back to the ship Resolution her original neutrality. The proclamation could only operate as a protection of the ship from British capture. We, therefore, lay out of question the ordinance of congress with regard to the rights of neutrality; this case is not within it.

*22]

But the ship Resolution is captured, and both ship and cargo are libelled as prize. A question is made; on whom lies the *onus probandi?* We think, on the captors. There can be no condemnation, without proof that the ship or cargo is prize; and it cannot be expected, that the persons who contest the capture will produce that proof.[1]

Every capture is at the peril of the party. A privateer is not authorised to capture every vessel found on the high sea: she is commissioned to capture only such ships as are the property of the enemy. Every ship, indeed, may, in time of war, be brought to and examined; but she is not to be seized and captured, without the captors have just grounds to think she is the property of an enemy, and not the property of subjects of a nation in peace and friendship, or neutrality. If such seizure and capture are made without just grounds, the party injured is entitled to have an action for damages: and it is the policy of all nations at war, to oblige the captains of privateers to give bond and security, to enforce a proper conduct while at sea, and to prevent seizures and captures from being wantonly made.

The sea is open to all nations: no nation has an exclusive property in the sea. Put the case, then, that a privateer meets a ship at sea; is it to be inferred, from the mere circumstance of the ship's being found on the high seas, that she is the property of an enemy? Surely, there is no ground for such an inference: On this ground, a privateer might seize and capture the ships of its own nation. But the privateer attacks, seizes, captures and brings the ship into port: it is plain, here is an act of violence; a seizure and capture. The captain, therefore, must do two things: at all events, he must show just grounds for the violence, or he will be punishable at law, by an action of damages: and in the next place, before he can obtain condemnation, he must prove the ship to be the property of an enemy; for it can never be enough for condemnation, that he found the ship at sea.

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[1] But the burden of proving a neutral interest rests on the claimant. The Amiable Isabella, 6 Wheat. 1; The Jenny, 5 Wall 183; The Mersey, Blatch. Pr. Cas. 187.

The captors say, "That in the present case they had not only just grounds for seizure; but they have also just grounds for condemnation: for both the ship and cargo were found in the possession of British subjects, and therefore, British property." It must be admitted, that possession is presumptive evidence of property; because possession is a circumstance which generally accompanies property; and therefore, the seizure and capture, in the present case, was a violence, at all events, justified by *the law of nations, and for which no action would lie, even on acquittal of [*23 the ship and cargo. But the possession in this case is no ground for condemnation: for what is the nature of presumptive evidence? It only has the force of evidence, whilst it remains uncontested. The possession is clearly accounted for: the ship came into the hands of the enemy by capture; and the prior possession was in the hands of Dutch subjects, and not British subjects. The presumption, therefore, relied on by the captors is defeated, and the argument founded on the possession is in favor of the claimants.

On the question of prize or no prize, what evidence does the law of nations admit for the determination of it? The national interest of every commercial country requires, that some mode or criterion be adopted to ascertain the ship, cargo, destination, property and nation to which such ship belongs; not only as a security for a fair commerce according to law; but as a guard against fraud and imposition in the payment and collection of duties, imposts and commercial revenues. The peace also and tranquillity of nations equally require, that the like criterion should be adopted, to distinguish the ships of different countries found on the high seas in time of war; to prevent an indiscriminate exercise of acts of hostility, which may lay the foundation of general and universal war. Hence it is, that every commercial country has directed, by its laws, that its ships shall be furnished with a set of papers called ship papers: and this criterion the law of nations adopts, in time of war, to distinguish the property of different powers, when found at sea; not indeed as conclusive, but presumptive evidence only. Bills of lading, letters of correspondence, and all other papers on board, which relate to the ship or cargo, are also considered as *primâ facie* evidence of the facts they speak; because such papers naturally accompany such a mercantile transaction.

Such then is the evidence which the law of nations admits on a question of prize or no prize; and it is on this evidence, that vessels with their cargoes are generally acquitted or condemned.[1] And therefore, if, in this case, the papers on board affirm the ship and cargo to be such property as is not prize, there must be an acquittal, unless the captors are able, by a contrariety of evidence, to defeat the presumption which arises from the papers, and can show just grounds for condemnation. On the other hand, if the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless they who contest the capture can produce clear and unquestionable evidence to prove the contrary.

The papers on board, the manifest, clearance, bills of lading, the depositions annexed, the certificates of the chief justice of Dominica, the French

[1] The Lilla, 2 Cliff. 169; s. c. 2 Spra. 177.

governor's passport, and the letters of correspondence *from the shippers, collectively taken, prove the ship to be the property of Brantlight & Son, subjects of the States General, at the port of Amsterdam, and the cargo to be the property of British capitulants, residing or owning estates in the Island of Dominica, and entitled to the rights of commerce according to the capitulation on the conquest of that island; except with regard to such parts of the cargo as were shipped by Morson & Co., Morson, Vance & Co., and Lovel, Morson & Co.

It lies then on the captors to obviate the force of this evidence: it must be obviated, or an acquittal must be decreed, to the full extent of the evidence.

The papers have been taken up by the counsel for the captors, and separately and distinctly considered, and it is said they do not prove the facts to which they are adduced. It is true, separately considered, they do not; but collectively taken, we think they do, except in the instances we have mentioned.

Many objections have been made to obviate the force of this presumptive evidence: the objections go to the competency of many of the papers, and to the credibility of all. "The certificates of the chief justice, it is said, ought not to be admitted as legal and competent evidence; for the chief justice is a British judge of the Island of Dominica, and an enemy." We do not think the chief justice of that Island, reduced as it is by conquest, can with propriety be called a British judge and an enemy. But whether he derives his commission originally from the crown, and still holds it under the articles of capitulation, and so far is a British judge, or not, he must certainly be subject to removal by the French government; and it highly derogates from the honor and dignity of the French crown, and too deeply affects the zeal and loyalty of Governor Duchilot, to admit the supposition, that a man is suffered to fill so important an office, who publicly prostitutes his official character from a partiality to the British nation. The chief justice gave his certificates officially and under the obligation of an oath: We must want charity indeed, if, under these circumstances, we were to say, that they have not even the force of presumptive evidence.

But the competency of this evidence, so far as it is adduced to prove the owners or shippers of the cargo British capitulants, is objected to, on another ground. It is said, "These certificates are not the best evidence the nature of the case will admit, and which the party has in his power to produce: an attested copy of the articles of capitulation, and the names subscribed, ought to have been produced."

This principle of evidence applies forcibly against the captors, but does not affect the claimants. The articles of capitulation bind Great Britain, France and America. It is a solemn compact *or treaty. All the parties to it, the citizens of each nation, are morally bound by it: and it is not only admitted, but contended for, by the counsel for the captors, that even neutral nations are under a moral obligation to regard it; and that it is upon this principle, the law of nations takes cognisance of and determines upon it.

*25]

The papers on board show a fair commerce, and affirm the cargo to be the property of capitulants, except in the instances mentioned. If they are not capitulants, and yet British subjects, they have violated the capitulation,

engaged in a fraudulent and illicit commerce, and are chargeable with a breach of moral obligation. The claimants stand upon two grounds of presumption: First, the presumption which arises from the papers; and then the presumption that no man would do that which he is morally bound not to do. The claimants cannot be affected, while these presumptions remain uncontested. How are they to be contested? By what evidence? Certainly, the best evidence that the nature of the case will admit, and which the captors have in their power to produce. And if an attested copy of the articles, and of the names subscribed is the best evidence to prove who are capitulants, it is the best to prove who are not capitulants; and therefore, the captors ought, on their own principles, to produce it; they having it as much in their power to produce such copy as the claimants.

But it is said, "the ship's papers are defective; the register is not produced; it is withheld, and gives a ground of suspicion." We have no doubt, a register was on board at the time of the capture: but we do not think there is any ground for suspicion, under the circumstances of the case. The Resolution was captured by a British privateer. The British captain took possession of the ship's papers, and Captain Waterburgh, the captain of the Resolution, was made prisoner. Afterwards, the Resolution was captured by the American privateer, and the American captain took possession of such papers as the British captain had suffered to remain on board the Resolution. Captain Waterburgh was not brought into port with his ship. It was the interest of both the British and American captains to withhold the register, if it proved the ship to be the property of subjects of the States General; and neither the British captain nor the American captain have made oath, that the papers produced to the court are all the papers which were found on board, and came respectively to their hands and possession.

But it is said, "no credit or faith is to be given to those papers, because replete with contradiction and absurdity. The *manifest, it is said, contradicts the bill of lading: the manifest purports the property of [*26 the cargo to be in the persons named therein as the shippers, and the bills of lading show, in many instances, that the property is in others."

The manifest exhibits a column under the description of shippers; and it also exhibits a column under the description of marks, and other columns for the cargo. The bills of lading correspond with the column of marks; and the persons described as shippers in the manifest, are ascertained by the bills of lading to be persons, who acted principally as attorneys, managers or agents for those who are mentioned in the bills to own the property for which the bills are taken; the property in the bills being in the general produce of such owners' estates in Dominica. There is, therefore, no contradiction between the manifest and bills of lading; for the term shippers does not imply the property to be in such shippers; the term as properly applies to a factor, or attorney or agent, as to the owner.

"But," it is said, "Governor Duchilot was imposed upon; that he refers in his passport and certificate, which is indorsed on the manifest, to the 17th article of the capitulation; that the 17th article speaks of such merchants as have goods or merchandise; and that, therefore, the governor must have been informed that the shippers were the owners of the cargo." It is true, the 17th article says, the merchants may sell their merchandise, and carry

on their trade, and the term *their* implies the property to be in them: but the term *their* may also apply to the property which a factor, agent or attorney has the possession, management and shipment of, for others; for, although they have not the general, yet they have the special property.

"But," it is said, "the shippers dared not to avow the names of the persons mentioned in the bills of lading, from a consciousness that they were not capitulants, and that the governor would have refused them a license, passport and certificate." If the shippers felt such a consciousness, why avow the names of such in the bills of lading? It was not only necessary to take measures to prevent discovery on the island, but also to guard against detention, on a capture at sea. Why was the governor's passport and certificate obtained? Was it not to protect the ship and cargo from capture? But if the manifest, passport and certificate had no reference to the bills of lading, but were contradictory and inconsistent, and the persons avowed by the bills of lading to be the owners of the property were not capitulants, is it not a novelty in the game of fraud, to furnish a ship with *27] such papers as proclaimed a contradiction to the manifest, *passport and certificate, announced the criminality of the commerce, and exposed both ship and cargo to capture and confiscation?

Prudence required, and very probably it was enjoined by the government, that before a ship should be suffered to clear out, and proceed on her voyage, proofs should be made and taken with her, not only that the shippers of the cargo were capitulants, but also, that the owners of the cargo were capitulants. It appears, in this case, that above three-fourths of this cargo were shipped by agents, and attorneys and factors. The governor certifies the shippers to be capitulants. The chief justice certifies the owners to be capitulants, and where his certificates are deficient, the depositions prove it. All this may be done, in conformity to the law, usage and practice of the island.

But another contradiction is objected: It is said, "the bills of lading contradict the other papers, which import the property of the ship to be in Brantlight & Son; for the bills consign the cargo to Brantlight & Son; and therefore, it is contended, the property of the ship could not be in Brantlight & Son; because, it is observed, to direct a man to pay freight to himself." The bills of lading are not chargeable with any such absurdity. The freight is not directed to be paid to Brantlight & Son; the freight is to be paid to the master; he is responsible for the wages of his crew, and other debts, contracted on account of the ship. Freight is answerable for all such claims, and the master is entitled to receive it, to indemnify himself: he may, therefore, refuse to deliver the cargo until the freight is paid. And by this means, in case of the bankruptcy of his owners, he is sure of an indemnification, to the extent of the freight.

But still another contradiction is objected: It is said, "that both the bills of lading, and the oath of Morson, on the back of the manifest, contradict the assertion of the other papers, that the ship is the property of Brantlight & Son: for they prove the consignment of ship to Brantlight & Son; and therefore, it is contended, the property could not be in them, because it is absurd to consign a ship to the owners." We do not see any such absurdity. Consignment is a mercantile phrase, adopted to distinguish the person to whose care a ship is addressed, and when applied to the owners, it

is merely in conformity to forms. It is the common usage and practice of merchants, to apply the phrase, indiscriminately, to owners and others.

"But," it is said, "the papers found on board the Resolution, do not sufficiently prove the ship to be the property of Brantlight & Son, when she arrived at St. Eustatius, from Amsterdam, early in 1780." It is proved, by the oath of Morson, and captain Waterburgh, indorsed on the back of the manifest, that this property *was subsisting, if not, at the time of the deposition, yet, at least, on the arrival of the ship at Dominica, October 1780. And Morson & Company's letter, to Brantlight & Son, dated 6th March 1781, after the rupture with Holland, and shortly before the ship left Dominica, and which was found on board, proves the property to be then subsisting: for, in the close of the letter, they say, "captain Waterburgh has drawn on you, in our favor, for disbursement, 191*l.* 15*s.*;" which disbursement plainly refers to disbursements of the ship, which Brantlight & Son could not be chargeable with, if they had parted with the property, and were no longer owners. [*28

No evidence at all is produced to show a change of property, or transfer of the ship. And therefore, the fact being admitted, that she was the property of Brantlight & Son, on her arrival at St. Eustatius, in 1780, and the property being proved to be subsisting in October 1780, and proved, to be subsisting in March 1781, a few days before she sailed from Dominica, we cannot doubt, but that the property was subsisting, at the time of her capture. She was then no prize to the British privateer; because protected by the British proclamation: she was no prize to the American privateer; because she was the property of the subjects of the States General, a nation in peace and friendship with America.

"But the papers," it is said, "prove the cargo to be the property of persons, not capitulants: for Morson & Company, in their letter of the 6th March 1781, speak of Kender Mason, as a shipper, who is not a capitulant." What does this letter say? It is addressed to Brantlight & Son, and informs them, that the rupture with Holland, occasioned all shipments to stop; that afterwards, the British proclamation, protecting the Holland vessels from capture, for a limited time, on their passage back from Dominica, came to hand; that even then, no one but Kender Mason and themselves would ship; that, afterwards, shipment went generally on. This letter proves clearly, that the cargo was shipped by many different persons. Not only Kender Mason shipped, but Morson & Company also shipped, and there were other shippers, who were alarmed, notwithstanding the British proclamation, and would not immediately ship, though afterwards they proceeded to ship.

To what extent did Kender Mason ship? Morson & Co.'s letter, which is the only evidence that he shipped at all, goes no further than to prove, that he shipped a part of the cargo. How shall this part be ascertained? The ship, it is admitted by counsel on both sides, was consigned to Morson & Co., and Alexander Henderson; and it appears from the papers on board, that upwards of two-thirds of *the cargo were shipped by Henderson, as agent and attorney for the British capitulants; the residue of the cargo was shipped, partly by James Morson, agent and attorney for British capitulants, partly by Morson & Co., and partly by others, in their own right, as agents and attorneys for others. [*29

The letter of correspondence which Henderson addressed to Brantlight & Son, to whom the ship and cargo were consigned, and his letters of correspondence, addressed to the gentleman at London, for whom he was agent and attorney; the bill of lading he took for the property shipped, and his deposition annexed to the said bill, give a fair history of such part of the cargo, as was shipped by him: they prove it to be the property of British capitulants, and not the property of Kender Mason. The depositions of James Morson, the bills of lading, and the certificates of the chief justice, point out and ascertain, what part of the cargo he shipped as agent and attorney, and prove it to be the property of British capitulants, and not the property of Kender Mason. The depositions, bills of lading, manifest, letters of correspondence, the governor's passport and certificate, and the deposition of Morson and Fitzgerald prove that the residue of the cargo, except what was shipped by Morson & Co., Morson, Vance & Co., and Lovell, Morson & Co. was the property of British capitulants, and not the property of Kender Mason.

If Mason, then, had any property on board, that property must have been in such parts of the cargo as were shipped by Morson & Co., Vance & Co., and Lovel, Morson & Co. With regard to this part of the cargo, the evidence is not full and complete: for although Morson is proved to be a capitulant, yet the company is neither ascertained, nor proved to consist of capitulants.

But it is contended, that the property shipped by Henderson was the property of Kender Mason. On what ground is the idea taken up, that Mason had any property at all on board? It is founded solely on that part of Morson & Co's. letter, which mentions Kender Mason as a shipper. Exclusively of this letter, there is nothing, besides mere conjecture and possibility, to prove that he had any property at all on board.

This much must be clear; that if Henderson was meant, then Mason was not meant. Morson & Co. say in their letter, "that even after the arrival of the British proclamation, no one but Kender Mason and ourselves, would immediately ship." If Henderson was not meant for Kender Mason, then Henderson was amongst those who were still alarmed, and would not immediately ship, on the arrival of the British proclamation; and, consequently, Kender Mason could have no property in what was shipped by Henderson: *30] *for it is absurd to say, that Kender Mason proceeded to ship, and Henderson did not, if what Henderson shipped was the property of Kender Mason.

But it is objected, "that although Kender Mason is mentioned in the letter, as a shipper, yet it is to be understood, that he is there described as principal to Henderson, and therefore, what was shipped by Henderson, may with propriety be said to have been shipped by Kender Mason."

What evidence is there of such a connection between Mason and Henderson? Mason's letters of correspondence are all addressed to Morson, and the ship is consigned to Morson and Henderson, as persons in separate and distinct interests. The idea too, of such a connection, is contradicted by the whole tenor of the papers found on board. If Henderson was the agent or attorney for Kender Mason; if he was the person, with whom Mason was so extensively interested, in his commercial connections, then the idea of his connection with Morson & Co., Morson, Vance & Co., and Lovel, Morson &

Co., ought to be abandoned: for it is not to be believed, that Mason should engage in three partnerships, and yet employ an agent or attorney, who ships forty times the quantity of produce shipped by all the three partnerships.

But it is contended, "that both ship and cargo are the property of Morson and Mason, in consequence of a plan concerted at London, between Kender Mason and Heshuysen, agent for Brantlight & Son, while the Ship Resolution lay at Eustatius." We have no doubt the voyage of the Resolution was planned at London, by Kender Mason and Heshuysen; but the plan must have been very different from the one suggested.

One of two propositions must be true; either Morson and Mason did not purchase the ship, and ship the cargo, in consequence of the plan suggested, or Morson has sworn falsely, and committed a perjury. Morson, the 7th March 1781, near twelve months after the Resolution's voyage was concerted at London, swears that the Ship Resolution, belonging to the port of Rousseau, and owned by Brantlight & Son, arrived at Dominica, Oct. 1780; for the purpose of taking on board a cargo of sugar and coffee, the property of capitulants. This oath flatly contradicts the assertion, that the ship was purchased; it also directly contradicts the assertion, that the plan was to ship a cargo, the property of Kender Mason; for Kender Mason is not a capitulant.

Morson's knowledge was competent to the facts he swore: He precisely knew what the plan was that was really concerted at London; for it is strenuously contended by the counsel for the captors, that Kender Mason, in his letter to Morson & Heshuysen, *inclosed to Waterburgh, contained a full communication of it. [*31

"But the papers," it is said, "found on board the Erstern, throw great light upon the subject; they pluck off the mask, and exhibit Mason in his proper colors; they prove, that an illicit commerce has taken place, and that the articles of capitulation have been repeatedly violated." Admit, for argument sake, the fact, that the Erstern was engaged in an illicit commerce, how can the conduct of the Erstern affect the Resolution?

But what is this illicit commerce, which is charged to have taken place? Let it be ascertained, and we shall find, it cannot possibly apply to the Resolution.

"British goods," it is said, "have been shipped from London, to Dominica, through the intervention of neutral ports." Can this species of illicit commerce apply to the Resolution? It is impossible; for she was never engaged in this Dominica trade, until after her arrival at Eustatius, early in 1780; and from thence she sailed to Dominica, where she lay, until the rupture between Great Britain and Holland took place; nor were Brantlight & Son ever engaged in such a commerce, for Morson & Co.'s letter, of the 6th March 1781, after the rupture, speaks of this house, as a new house, with which the people of Dominica were unacquainted; and mentions the difficulties he had, from that circumstance, to procure consignments.

"But the papers," it is said, "of the Erstern, prove that the produce of Dominica has been exported to London, through the intervention of neutral ports." Was the Resolution ever engaged in this species of illicit commerce? The peculiar circumstances of her case show, that she never was. The rupture with Holland took place while she lay at Dominica; it stopped all shipments. On the arrival of the British proclamation, protecting Holland

vessels, for a limited time, on their passage back, shipments went on; but the protection, which the proclamation gave, ceased on the arrival of Holland vessels back to their ports in Holland.

What ground, then, is there to think, that the Resolution, with her cargo, were destined, after her arrival at Amsterdam, to proceed to London, where both ship and cargo would have been liable, after her departure from Amsterdam, not only to British capture; but, as contended by the counsel for the captors, liable also to Dutch capture, war prohibiting all commerce between the belligerent powers; and not only liable to British and Dutch capture; but, as the law of nations has been stated by the counsel of the captors, liable also to French, Spanish and American capture?

"But the papers," it is said, "of the Erstern, prove that Morson and Mason, who planned the voyage of the Resolution, *also planned the voyage of the Erstern; and, therefore, if the Erstern was engaged in an illicit commerce, the presumption is, that the Resolution was also employed in such commerce." We have already observed, that the Resolution could not possibly be engaged in the illicit commerce, with which the Erstern is charged; but if Morson and Mason planned both voyages, Morson knew the plan on which the Resolution was chartered, and he has proved it, on oath, to be a fair one, and in perfect conformity to the articles of capitulation.

*32]

"But Mason, in his letter from Ostend, August 1781, found on board the Erstern, writes to Morson, that he has nearly accomplished the plan, which he informed him of in his letter dated October 1780, from Rotterdam, and it is contended, that this letter proves, that a plan is established at Ostend, to centre there the whole Dominica trade, and to furnish British goods for Dominica, through that channel." Admit the facts to be so; how does it affect the Resolution and her cargo? The rupture with Holland had taken place, and the Resolution was captured, and brought into port, several months before the plan was accomplished at Ostend, and, consequently, whatever illicit practice that plan points at, cannot apply to the Resolution.

But it is said, that the plan established at Ostend, was the plan, which was concerted at London, and established at Amsterdam and Rotterdam, and shifted from those cities to Ostend, on account of the rupture with Holland. If the plan, now established at Ostend, is nothing more than the plan adopted at London, with regard to the Resolution, then it is a fair one; for Morson has told us, what the plan was, and he has declared it on oath. But we are of opinion, that the system now established at Ostend is a new one, and that it is not a former plan, shifted from Holland to Ostend, on account of the rupture. It originated, indeed, before the rupture, and might have taken place in Holland, had it been completed before that event. It is of such a nature as requires Morson to take his residence at Ostend. It occasioned a change in his commercial connection at London, and a dissolution of the partnership, in which he was there engaged. The cargoes shipped from Dominica, though consigned to Liebert, Baas, Dardine & Co. were nevertheless to be disposed of, under his superintendency. It was upon this plan, whatever it was, that the Erstern sailed; she may be affected by it, but the Resolution never can.

We have said, the whole cargo of the Resolution is disproved to be the property of Mason; except such parts of it as were shipped by Morson & Co., and therefore, if Mason had any property at all on board, it must be in

such part of the cargo. *We feel the force of the reasoning which has been employed to show, that the name of Kender Mason was inserted by mistake; but, as Mason, who appears to us to be a partner in three partnerships, and to have been the active person in shipping this part of the cargo, has acknowledged, for himself and company, that Kender Mason was a shipper, and the evidence, upon a careful review of it, leaves an opening to apply that acknowledgment to a concern in the three partnerships, we are led to change the opinion we had entertained on the first argument, with regard to this point, and now think, that this part of the cargo must be condemned as prize; and not only Mason's proportion of it, but also the whole interest of the three partnerships: for the shipping of produce by Mason, who is not a capitulant, is a violation of the capitulation; and as the three partnerships were consenting to it, and neglected their interest with Mason, they are *participes criminis*, and must equally suffer. So far we have thought proper to animadvert on the new evidence, and the argument and observations of the counsel upon it. And although, on a decree of acquittal, almost the whole cargo will go into the hands of those who are not the friends of America, notwithstanding they have stipulated a neutrality during the war; yet, as they are entitled to it, by the articles of capitulation, which bind America, the law of nations operating on those articles as a solemn compact, commands that such a decree must be given. We hope, we feel just impressions of the wrongs and cruelties of Great Britain; but public faith must be maintained; the honor and dignity of the United States preserved and the law of nations dispassionately and righteously administered.

We, therefore, adjudge and decree, that the order of this court, suspending the original decree, be discharged, and the said original decree be affirmed in all its parts, except with regard to such parts of the cargo, as were shipped by Morson & Co., Morson, Vance & Co., and Lovell, Morson & Co., which parts of the cargo we do adjudge and decree to be condemned, for the use of the captors, chargeable, nevertheless, with the stipulated freight,

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JANUARY SESSION, 1782.

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*The Erstern. [*34

Darby *et al.*, appellants, *v.* The Brig Erstern *et al.*

Neutral property.—Prize.

If the owners of a neutral vessel violate their neutrality, by taking a decided part with the enemy, their ship is in the predicament of enemy's property, and subject to seizure and confiscation, as lawful prize.

This was an appeal from the admiralty of the state of Massachusetts-bay, where the brig and her cargo had been acquitted. The case was argued on the 28th, 29th and 30th of January; and on the 5th February 1782, the definitive sentence of the court was pronounced by Paca and Griffin, the presiding Commissioners, in the following terms:

By the Court.—Upon the evidence in this case, we are of opinion, that the brig, at the time of her capture, was the property of Imperial subjects at Ostend, and that the cargo was British property, unprotected by the capitulation of Dominica.

It is objected, "the brig is not prize, because neutral property." Neutral property cannot be captured: for while the character of neutrality is preserved, such property is the property of a friend, on which the rights of war cannot attach; but the owners of a ship may violate their neutrality, by taking a decided part with the enemy: in what light is such a ship then to be considered, and what is to be done with her? The law of nations says, that a ship, under those circumstances, is in the predicament of enemy's property, and subject to seizure and confiscation.

But it is said, "the ordinance of congress ascertains in what cases the rights of neutrality are forfeited; that the present case is not comprehended; and therefore, if not protected by the law of nations, yet it is protected by the ordinance of congress."

We are of opinion, that congress did not mean, by their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, in exclusion of all other cases; for the instances not mentioned are as flagrant as the cases particularized. The ordinance does not specify the case of a neutral vessel employed in carrying provision to a place which is besieged, and in want of bread: for although one of the articles says, "you shall permit all neutral vessels freely to navigate on the high seas, or the coasts of America, except such as are employed in carrying contraband goods or soldiers to the enemy;" yet another article says, that the term *contraband* shall be confined to the articles there enumerated, and provision is omitted. *35] Were *congress asked, whether they meant to protect from capture, a neutral ship loaded with provision, and destined for York and Gloucester, when besieged by the armies of the United States and France, no one could possibly doubt what their answer would be. The plain and obvious construction of the ordinance is, that while neutral vessels observe the rights of neutrality, they shall not be interrupted by American captures: Congress meant to pay a regard to the rights, and not to the violations of neutrality.

But it is objected, "that in this case, if the brig has violated the rights of neutrality, it is because she intended a violation of the capitulation of Dominica; that the capitulation of Dominica can only be considered as a local law, of which there can be no breach, until the offending ship comes within the civil jurisdiction of the island; that the brig was captured before the arrival within the jurisdiction of Dominica; and that, therefore, she was captured, before there was any violation of the rights of neutrality." If nothing could be objected against the brig, but an intentional violation of the capitulation, abstractedly from the consequences, with regard to the war between Great Britain, France and the United States, possibly, such reasoning might be conclusive: but we are of opinion, that the brig has done more than a mere intentional offence, with regard to the capitulation.

The subjects of a neutral nation, cannot, consistently with neutrality, combine with British subjects, to wrest out of the hands of the United States and of France, the advantages they have acquired over Great Britain by the rights of war; for this would be taking a decided part with the

enemy. On the conquest of Dominica a capitulation took place, and by that capitulation, a commercial intercourse between Great Britain and that island was prohibited: the object was, to weaken the power of Great Britain, by lessening her naval and commercial resources. But what has been the conduct of the brig, and the Imperial subjects, her owners? Kender Mason, a British subject, establishes a plan at Ostend, by which the commerce of Great Britain with Dominica is to be kept up and preserved, through the intervention of that port. On this plan, Liebert, Beas, Dardine & Co., Imperial subjects, purchase at London the brig Erstern: Kender Mason puts on board a cargo of British merchandise, the property of British subjects: the brig clears out from London, ostensibly for Ostend, and there arrives: Liebert, Beas, Dardine & Co. supply her with false and colorable papers, assume upon themselves the ownership of the cargo, and dress it up in the garb of neutrality, to screen it from detention and capture: the brig then clears out for Dominica, and sails for that island with the cargo she took on board at London.

*Can such conduct consist with neutrality? Can there be a more flagrant violation of it? Does it not aim to wrest from France and the [*36 United States, the advantages they acquired by the conquest of Dominica: And does it not evince a fraudulent combination with British subjects, and a palpable partiality?

But, "why shall the rights of neutrality be broke by works of supererogation? If the cargo was British property, unprotected by the capitulation, it was then the property of enemies, and as it did not consist of contraband articles, it was protected from capture, by the ordinance of congress: the brig, therefore, needed not to employ fraud and stratagem, to give it the garb of neutrality, in order to screen it from capture."

If the offence which the brig has committed, consisted in employing fraud and stratagem, merely to protect property which belonged to an enemy, the objection might, in consequence of the ordinance of congress, be of some force. But the offence is not of so limited a nature; it is far more extensive, and comprehends a flagrant violation of the rights of neutrality: it results from a fraudulent combination with British subjects, to give weight and energy to the arms of Great Britain, by the re-establishment of a commerce, and its emoluments, which she had lost by the conquest of Dominica.

But it is objected, "The cargo is not prize, because it is not contraband, and all the other effects and goods, though the property of an enemy, are exempted from capture by the ordinance of congress." If the Erstern had been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because congress have said, by their ordinance, that the rights of neutrality shall extend protection to such effects and goods of an enemy. But if the rights of neutrality are violated, congress have not said, that such a violated neutrality shall give such protection: nor could they have said so, without confounding all the distinctions between right and wrong.

Upon the whole, we are of opinion, that the decree below be reversed, and that the said brig and cargo be condemned, as prize, for the use of the captors, without costs.

THE GLOUCESTER.

KEANE *et al.*, libellants and appellants, *v.* THE BRIG GLOUCESTER *et al.*, appellees.

Prize money.

A libel will lie, in the admiralty, by the crew of a privateer, for their respective proportions of a prize.

If the marshal undertake to make distribution among the captors, without the orders of the court, he does it at his peril.

If no articles be executed, the admiralty court will make distribution of the proceeds of prize property, in proportion to the number, interest and merits of the captors.

Persons who sign the articles, and are, subsequently, without fault on their part, discharged, and put on shore by the captain, are entitled to participate as captors in the prizes taken, although fresh articles were signed by the captain and the remainder of the crew, after their discharge.

Mahoon *v.* The Gloucester, 3 Hopk. 55, affirmed.

THIS was an appeal from the Admiralty of Pennsylvania, and after argument, PACA and GRIFFIN, the presiding Commissioners, delivered the following sentence.

*37] *BY THE COURT.—Two objections are made to the decree below: The first objection is, that a libel does not lie by the crew of a privateer, for their respective proportions of a prize. The second objection is, that the libellants, in this case, are not part of the privateer's crew, nor captors, entitled to a proportion of the prize stated in their libel.

With regard to the first objection, we are of opinion, that a libel does lie, and that it is the proper and regular mode of redress: for the commission of a privateer, according to the form established by congress, extends not only to the captain, but also to the ship and crew; they are captors, as well as the captain, and their rights to the thing captured, are equally founded on the commission. The ship is figuratively considered as an agent, and represents the owners. Articles of agreement generally direct the distribution; but if no articles are executed, the admiralty courts will make distribution, in proportion to the number, interest and merits of the captors.

But it is said, "the admiralty court, in this case, had exercised all its jurisdiction and power; that a libel was filed by the captain, and a decree passed for condemnation; that the prize has been sold, and the money lodged in the hands of the marshal; that the marshal must make distribution, according to the list of the crew, which the captain shall deliver; and if the captain makes a false list, the party injured has no other remedy than by an action at law."

The original libel, we find, was filed by the captain, in behalf of himself and crew, and the decree adjudges the prize to the captors. The marshal has sold the prize, and the money lies in his hands; on application, he refuses to pay the libellants; and the question is, what is the mode of redress? We are of opinion, that the libellants had a double remedy: they had an action at law, for money had and received to their use; and they were entitled to a supplemental libel, upon which a decree and order might have been obtained, to compel the marshal to pay the money. Such a libel is nothing more than a form of proceeding, to carry into execution the original decree; and if the admiralty courts are competent to give judgment, they must be competent to carry it into execution.

We are also of opinion, that if a marshal makes distributon, without the orders of the admiralty court, he does it at his peril. The list or return of the crew by the captain, is no justification for his payments. He is the officer to carry the decree of the court into execution, and he must take care that his payments are made according to such decrees; for on misapplication of the payment, a libel will lie to make him responsible. If he would, therefore, act safely, he ought, before he makes *his payments, to obtain the order and direction of the court; and the admiralty courts [*38 ought not to make an order, without previous measures to guard against fraud and imposition, by providing for latent claims.

But on the second ground, it is said, the decree below ought to be reversed; which is, that the libellants are not part of the privateer's crew, nor captors, entitled to the prize stated in their libel. It is proved, and admitted on all hands, that the libellants were shipped on board the privateer, at Philadelphia; that they were shipped under the articles of agreement, and shipped and received on board, as part of the privateer's crew; that, as part of the privateer's crew, they navigated the privateer down to Chester; that there, the captain, without any objection to their skill or ability, ordered them on shore, and obliged them to abandon the privateer, and left them; and that, afterwards, he and all the residue of the crew, destroyed the original articles of agreement, and executed a fresh set.

Under the circumstances stated and admitted, we are of opinion, that the libellants are entitled to a full proportion of all prizes which were captured during the cruise, for which the libellants were engaged, and from which they were forcibly excluded. We have already observed, that the right of the crew to captures is not founded on the articles of agreement; but on the privateer's commission. When the libellants were shipped at Philadelphia, and received on board by the captain, as part of the crew, the right, under the commission, attached. This right they derived from an authority paramount to the captain, and therefore, the captain could not arbitrarily deprive them of it.

But it is said, the captain only did the wrong; and therefore, he alone should be responsible for it, and not the residue of the crew. The libellants do not seek a compensation for a wrong; they are not in pursuit of damages for a *tort*. When they were shipped and received on board at Philadelphia, they then became part of the crew, and the right to capture and make prizes was a right they held jointly with the ship and officers, and residue of the crew. The articles of agreement directed the distribution, and ascertained the share; and the libel is for shares, according to the articles. The demand, therefore, which the libellants make, does not lessen the shares of the residue of the crew, nor call on them for a compensation: it is a demand, which the residue of the crew acknowledged and agreed to, when they executed the articles.

*But it is said, on the dismission of the libellants, their proportion of the risk and labor fell on the residue of the crew; and therefore, [*39 they ought to have an additional compensation beyond the articles of agreement. Whatever compensation, they may, in justice be entitled to, they cannot dispense with, nor derive it from the articles of agreement. The articles make no provision for such events, and no man on board, can claim beyond the extent of the articles. On this ground it is, that although a

mariner, who is once shipped on board, and is dismissed by the captain, without fault, before the voyage is ended, is entitled to his stipulated wages for the whole voyage; yet the residue of the crew can only claim to the extent of their contract; although, by the dismissal of such mariner, the risk and labor becomes proportionally greater.

But it is said, that after the dismissal of the libellants, new articles were executed by the captain and residue of the crew; by which their shares of prizes were augmented, in proportion to the lessening of the crew, by the libellants' dismissal: and that the libellants' claim affects their right under the subsequent articles. The captain and the residue of the crew could not cancel the original articles of agreement. When a contract is made, it can only be dissolved by the consent of all parties. The after-articles, therefore, cannot affect the original articles, nor authorise a departure from them. These articles, instead of militating against the libellants' claim, tend to establish it on another ground: for they show that the residue of the crew approved of the dismissal, and therefore, ought to be considered as *participes criminis*, and equally responsible with the captain.

But it is said, "that the libellants did not, by any personal service, contribute to the capture in the present case; that the prize was taken by the ship, the captain and officers, and residue of the crew; and that although the libellants had a right, under the commission, to make captures, yet the right was not exercised in the capture of the prize in question." The ship, captain, officers and crew were joint-tenants of the right to capture and make prizes conceded by the commission. Whatever was acquired in consequence of this joint right and interest, must be considered as common stock, and like the case of a joint partnership, not subject to survivorship. Where the right and interest is a joint concern, the question never can be material, which of the parties have been most active and alert: the only question that can arise must be—whether the joint concern and interest is fairly subsisting?

Upon the whole, we are of opinion, that the decree below be affirmed, with costs to the libellants.

MAY SESSION, 1783.

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*40] *THE SQUIRREL.

STODDARD, appellant, *v.* REED, appellee, and THE SCHOONER SQUIRREL and Cargo.

Sale of perishing property.

Prize property, in a perishing condition, may be ordered to be sold, before appearance.

ON motion of the appellant's counsel, before an appearance filed on behalf of the appellee, stating that the prize schooner was in a perishing condition, it was ordered—

BY THE COURT.—That the schooner, her tackle, apparel and furniture be sold at public auction, to the highest bidder, for the use of those to whom the same shall be finally decreed.

MAY SESSION, 1784.

THE SPEEDWELL.

BAIN, *et al.*, appellants, *v.* The SCHOONER SPEEDWELL *et al.*, appellees.

Treaty of peace.

A vessel captured after the signing of preliminary articles of peace, cannot be condemned as prize.

THIS was an appeal from the Admiralty of the State of Rhode Island, where the schooner had been condemned as prize; and the record was submitted to the decision of the court, without argument. On the 24th of May 1784, GRIFFIN, READ and LOWELL, the presiding Commissioners, delivered the following judgment:

BY THE COURT.—It appearing by the inspection of the record, that the schooner in question, was captured from the British, since the operation of the preliminary articles of peace (to wit, on the —— day of ————), the condemnation cannot be sustained.

Decree reversed.

MAY SESSION, 1787.

*LUKE, &c., *v.* HULBERT *et al.* [*41

Appeal.

The resolution of Congress of June 1786, gave a discretionary power only to the commissioners of appeal, to allow an appeal, where particular circumstances, consistent with right and justice, might, in their opinion, require it.

THIS case now came before the court, on a petition, that the appeal should be sustained: but GRIFFIN, READ and LOWELL, Commissioners, rejected the application in the following terms.

BY THE COURT.—In this case, the judgment of the court will be determined by the construction of the resolution of congress of June 1786.

Congress having established a system of appeals, and in that system having limited a period, beyond which appeals are not to be entered, we think, the resolution of June 1786, could only mean, that, in conformity with this prior establishment, the judges might use a discretionary power, where particular circumstances, consistent with justice and right, may, in their opinion, require it.

Whatever decree the court might have made, upon the merits of the cause, and although the property may have been illegally condemned in the maritime courts; yet, under all the circumstances of the present case, we are unanimously of opinion, that justice and right do not require, that the appeal should now be sustained.

Petition dismissed.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

MAY SITTINGS, 1788.

BOINOD *v.* PELOSI.

Set-off.

Where an insolvent, after his discharge, deposited goods with a factor for sale, which were purchased by a creditor, it was *held*, that in an action by the factor for the price, the defendant could not set off his claim against the insolvent—the right to the proceeds having vested in his assignees.

LOYER, an insolvent debtor, after his insolvency, deposited with the plaintiff an atlas, to be sold, and the defendant purchased it at Boinod's store Discovering that the atlas had belonged to Loyer, the defendant, who was one of his creditors, refused to pay for it to the plaintiff, insisting that he had a right to set off his debt against the price. The plaintiff, thereupon, summoned him before a justice of the peace; and, the justice refusing to admit the set-off, the defendant appealed from that decision.

On the trial of the appeal, *Heatly* contended, for the defendant, that the set-off ought to have been allowed under the insolvent law (1 Dall. Laws, p. 164). But even if the justice was right in his refusal, he said, the action could not be maintained in Boinod's name, as the assignees were alone entitled to sue for the effects of the insolvent, after his assignment.

Du Ponceau, for the plaintiff, observed, that there was no set-off at common law; and that it had not been authorised by any legislative provision, in the case of a factor; which was the situation of his client. Cowp. 255. As the assignees are not contending parties, it is unnecessary to show that Boinod had a lien. Ibid.

In the charge to the jury, SHIPPEN, President, stated, that this was an action for goods sold and delivered; that the plaintiff had an indisputable right to bring the action, either in his own name, or in the name of his principal; and that he had properly chosen the former, as the contract was made with him. That, in answer to the defendant's allegation, of the property's belonging to Loyer, it was to be remarked, that after the assignment, [*44 *the property was for the benefit of all Loyer's creditors; and that,

although his factor might have a lien, the vendee of the factor certainly had none. That, in strictness, perhaps, the assignees of Loyer had the right to the atlas, or the price for which it sold; but that, certainly, at the time of the sale, it was not the property of Loyer, and if not vested in the assignees, it must have belonged to Boinod, by virtue of some special lien. And that upon the whole, the plaintiff was entitled to recover, though he was answerable over to the assignees.

Verdict for the plaintiff.

AUGUST SITTINGS, 1790.

Bowen *v.* Douglass.

Continuance.

A plaintiff under rule for trial or *non-pros.*, may nevertheless have a continuance, on showing reasonable cause.

The plaintiff had taken out a *subpœna*, returnable to December term last, for two witnesses who lived in Montgomery county; but as they did not then appear, an attachment, directed to the sheriff of Montgomery county, was issued, returnable to the succeeding March term; when, likewise, default was made in the appearance of the witnesses; and the cause was continued, on a rule for trial at the next term or *non-pros.* Another *subpœna* had been taken out, returnable this day, on which the cause was marked for trial; but it proved as ineffectual as the preceding writs.

Under these circumstances, *Levy*, for the plaintiff, moved to postpone the trial. He stated (and it was not denied by the opposite counsel), that an application on his part to take the depositions of the witnesses had been refused: and he read a letter from the sheriff of Montgomery, to show that an attempt had been made to serve the attachment upon the witnesses; a certificate from the doctors, to prove that one of the witnesses was sick; and a certificate from disinterested and credible persons, to prove that the other witness was out of the way. *Schlosser* v. *Lesher*, 1 Dall. 251.

McKean, for the defendant, objected to the postponement; and insisted, that the rule for trial, or *non-pros.*, ought to be enforced, *as the plaintiff, having neglected to issue a second attachment, had not done everything in his power to procure the attendance of the wittnesses. But— *45]

By the Court.—It is questionable, whether the act of assembly empowers us to issue writs of attachment into another county; and there are other modes of proceeding, equally efficient, and clear of any doubt. It is unnecessary, however, to enlarge at present on this topic; as the plaintiff has evidently done all in his power to procure the attendance of the witnesses; and the refusal of his overture to take their depositions, is a strong additional circumstance in his favor. The cause must, therefore, be continued, subject to the rule for trial at the next term, or *non-pros.* And in the mean time, we direct, on our own authority, a rule to be entered for taking the depositions of infirm witnesses *de bene esse;* to be read in evidence

upon the trial, in case of death, or inability to attend. To that extent only, however, do we grant the rule; for we think it would be going too far to add, that the depositions shall be read, in case the witnesses depart from the state.[1]

INGLIS, for the use of REEDE *et al.*, *v.* INGLIS'S EXECUTORS.

Opening and conclusion.—Assignment of legacy.

Where there are two pleas, one affirmative and the other negative, the plaintiff has the opening and conclusion.

A formal assignment of a legacy will prevail over the equity of a third person, to whom the assignor was indebted, and to whom he had promised to make an assignment, but not upon any present consideration.[2]

THIS was an action of debt, to recover a legacy of 150*l*, which Samuel Inglis had bequeathed to his brother George Inglis, the nominal plaintiff, by his last will and testament, bearing date the 12th of August 1781. The defendants pleaded, 1st. Payment; 2d. *Nil debent.*

The circumstances of the case were these: The testator died in the beginning of September 1783; and George Inglis, being in an embarrassed situation, obtained a friendly loan from Mr. Coxe, of $100, and assigned his legacy under his brother's will, to that gentleman, on the 5th of April 1784, in trust, that Mr. Coxe should reimburse himself, and pay over the balance to the legatee; who acknowledged, at the time of the transaction, that there was some difficulty in getting the money from the executors. Accordingly, when Mr. Coxe applied, a few days afterwards, to one of the executors, in behalf of George Inglis, some doubts were expressed to him, whether the legacy would be paid at all; as G. Inglis was considerably indebted to the estate of the testator, and other persons lately concerned with him in trade; but upon Mr. Coxe's disclosing the nature of his bond, and of the assignment which he had taken to indemnify himself, the executor, in terms of great caution, and expressly for the family honor, promised to pay as much as would satisfy Mr. *Coxe's claim; which promise was punctually performed, at the end of the year from the testator's death, allowed, [*46 either by the operation of the law, or prescribed according to the provisions of the will, for the payment of legacies. It appeared likewise, that on the 26th of April 1784, G. Inglis, having bargained for the purchase of certain goods from Reede & Forde, in payment of the value, amounting to 112*l.* 4*s.* 6*d.*, executed another assignment to them, for the residue of the legacy in question; and on the 4th of January 1788, Mr. Coxe, by an instrument, reciting the debt originally due to him, the legacy bequeathed to G. Inglis, the first-mentioned assignment and the motives on which it was made, the receipt of 37*l.* 10*s.* from the executors, and the residuary assignment last mentioned, transferred the unsatisfied interest in the legacy to Reede & Forde. Mr. Coxe had not, however, communicated to Reede & Forde the obstacles suggested by the executors, as to the assignment of the legacy, before the execution of the residuary assignment to them; nor, indeed, was

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[1] The rules of court now provide for the entry of a rule to take the depositions of going witnesses, as of course.

[2] Wylie's Appeal, 92 Penn. St. 196. And see Benford *v.* Sanner, 40 Id. 9; Tyson's Estate, 2 Pears. 479.

there any evidence that they were apprised of that circumstance, until they applied to Mr. Coxe to institute the present suit, when he mentioned it to Forde.

But in opposition to the claim of Reede & Forde, under their assignment, it was shown, that G. Inglis was previously indebted to the house of Inglis & Long, in which the testator was concerned, and that he was also considerably indebted, in partnership, to the house of Willing & Morris, surviving partners of Samuel Inglis. Being, however, at the same time entitled by an article of agreement to a share in the commission on the assignments of goods from Jamaica to Samuel Inglis & Co., he applied to them, in September 1783, for the amount due to him out of that fund; but, at first, they refused to pay it to him, in any other way, than by carrying it to the credit of his account; though, afterwards (in December 1783), on a representation of his distresses, as well in conversation, as in letters, they advanced him the money. In the letters which he wrote upon the occasion (dated the 20th of October and the 5th of November 1783), he mingled with the language of misfortune and complaint, an overture of transferring his claim to the legacy, in satisfaction of the debt to Willing & Morris, as surviving partners of Samuel Inglis & Co.; provided his share of the Jamaica commission was paid to him; saying in the first letter, "that he would cheerfully assign the legacy;" and in the second letter, that "he would assign it;" but, neither before nor after the receipt of the commissions, entering into any formal instrument of assignment.

On these facts, the question to be tried was—whether Reade & Forde, or Willing & Morris, were entitled to the balance due on the legacy? And it was argued by *Levy*, for the former, and by *Fisher*, for the latter.

*47] *There being two pleas; one affirmative, and the other negative, a preliminary discussion arose between the counsel, as to the right of beginning; which the PRESIDENT terminated, by declaring it to have been long settled, that where there are two pleas, and the proof of one of them lies upon the plaintiff, he shall always open the cause.

In support of the claim of Reede & Forde, it was argued, that the goods had been sold to G. Inglis, on the credit of the legacy, and not upon his personal credit; that the assignment was of a date prior to the delivery of the goods, so cautiously had they conducted themselves, in order to avoid a contrary construction; and that the year observed for this payment did not elapse until some time after the sale of the goods had been completed. It was remarked to have been the intention of the testator, to afford a personal relief to his brother, and not to furnish a fund for the payment of his debts; from which it was concluded, that the construction necessary to the opposite claim, being so contrary to that particular intention, ought, at least, to be strongly supported by the general reason and justice of the case.

But reason and justice co-operate with the testator's intention. There was no notice either to Coxe, or to Reade & Forde, of the alleged assignment in favor of Willing & Morris; for although it was intimated to Coxe, that there were claims subsisting against the legatee, he had no reason to expect that an actual assignment of the legacy would ever be pretended. Notice is indeed essential to the validity and effect of an assignment; for, being an equitable transfer, it must be taken subject to every equitable cir-

cumstance. In the present case, however, there was no assignment in fact, nor in law, but merely an offer to assign. It is true, that an incomplete conveyance will, in some instances, be carried into effect by a court of equity; but the court will never exercise such a jurisdiction, in aid of a creditor, who did not trust to the particular fund, against the claim of a creditor who did. In England, a judgment-creditor does not trust to the lands: and therefore, articles made for a valuable consideration, and the money paid, will, in equity, bind the estate, and prevail against any judgment-creditor, *mesne* between the articles and the conveyance. 1 P. Wms. 282. But there was not even a sufficient consideration for the pretended assignment to Willing & Morris. The commissions on the Jamaica assignments had amounted to 600*l.* or 700*l.*, and the balance paid to G. Inglis, on 1st December 1783, amounting to 276*l.*, was due to him in his own right; but the debt which he had contracted with Willing & Morris was a partnership debt; and to compel him to surrender his legacy, merely to obtain his own money, was an unconscionable *act of coercion, void of any legal foundation. The credit originally given by Willing & Morris had no possible relation to the legacy; nor [*48 can it fairly be presumed, that the subsequent payment was made on account of that fund; for it is incredible, that a balance of 276*l.* should be advanced in consideration of a legacy amounting to more than 150*l.* The question, therefore, may reasonably and justly rest on this ground, that Willing & Morris, sensible of the hardship that would be done by retaining the commissions due to G. Inglis, and affected by the distresses of the brother of their late partner, freely paid the money, without relying on any other agreements for the payment of their debt; while Reade & Forde, doubtful of the resources of G. Inglis, sold their goods to him on the credit of the legacy alone; and under these circumstances, the claim of the latter must, in law and equity, be preferred.

For *Willing & Morris*, who were the real defendants, it was contended, that the offer to assign the legacy, and the payment of the commissions, in consequence of it (from which latter circumstance an acceptance of the offer was inferred), amounted to a complete contract. The reimbursement of Mr. Coxe was clearly no evasion of that contract; but merely an acknowledgment of family obligation, accompanied also with a declaration that nothing more should be paid on account of the legacy. Wherever possession goes according to an agreement, the bargain shall be considered to be executed, although no papers have passed between the parties (1 Vern. 363); and, indeed, the general rule is, that whatever, for a valuable consideration, is covenanted to be done, shall, in equity, be looked upon as done. 3 P. Wms. 215; 1 Id. 277. But Willing & Morris, besides the conclusion from these authorities, as the surviving partners of S. Inglis, might reasonably presume, that no formal assignment was necessary, since the personal estate of the testator was involved in the joint-stock of the company; and when they paid the commissions, they acquired, *ipso facto*, a right to retain the legacy that had been offered as an inducement for that payment.

Nor is there a want of that notice, which will satisfy the law upon this occasion. Mr. Coxe, the first assignee, was apprised, in the very origin of the transaction, that there would be some difficulty in obtaining the legacy; and the executor, to whom he applied, declared, that no more than the

amount of Mr. Coxe's debt would be paid. If notice, therefore, was necessary, it is decided, that notice to a first purchaser is binding upon all who follow him. 2 Atk. 242.

But it is certain, that whoever gets the verdict, an innocent person will suffer. The only question, therefore, is, whose right *is the best? *49] Where the parties are equal in equity, the priority of right furnishes a fair rule for decision; and the claim of Willing & Morris is not only founded on a greater value in point of confidence, but on a superior title in point of date. The executors had early notice of it; they were justifiable in retaining the legacy to pay it; and the action now trying is sufficient evidence of their refusal (after being warned for that purpose) to recognise the adverse assignment.

The President, having recapitulated the evidence, as stated in the commencement of this report, proceeded in delivering the following charge to the jury:

SHIPPEN, President.—The action brought to recover the legacy in question, turns, in reality, upon a dispute between Reede & Forde (who have a right to use the legatee's name on the occasion), upon the one hand, and Willing & Morris, upon the other. The assignees of the nominal plaintiff have produced a regular transfer of the legacy; and are unquestionably entitled to a favorable verdict, unless their claim is satisfactorily repelled by any circumstance of law or equity, arising from the defence which has been made.

It is objected to their claim, then, that Willing & Morris are entitled to the legacy, by virtue of a prior assignment; and although this assignment is not so regularly proved as the other; yet, the defendant's counsel has argued, that it is equally effectual in point of equity. The facts respecting the alleged assignment to Willis & Morris are briefly, that G. Inglis, being entitled to a sum of money for his share in the commissions, arising from the sale of goods consigned to S. Inglis & Co., applied for payment to Willing and Morris, the surviving partners; that they refused, at first, to make the payment, insisting that they would retain the amount in satisfaction of a debt due to them from G. Inglis; but that, eventually, they complied, being strongly solicited by G. Inglis, who in his letters offered to serve them in any way, and particularly to make over his legacy. Now, it is contended, that this compliance must be taken to have been on the terms of the request; and that the terms amount, at least, to a promise of an assignment. The case upon the facts disclosed is not, indeed, free from doubt, but if the jury shall, upon the whole, be of opinion, that the parties, in paying and receiving the commissions, contemplated and intended a transfer of the legacy, as a consideration, then, the law stated by the defendants being well founded, the promise to assign created an equitable right, and without any further formality, vested the legacy in Willing & Morris. For by making and accepting an offer, every bargain is consummated.

Much has been said on the point of notice; and it is true, that if the obligee of a bond assigns it, notice ought to be given *to the obligor, *50] in order to prevent his paying the money to the person who has thus parted with his interest. But there is no positive law, that requires a first assignee to notify a subsequent one; and the case is not within the general principle of the rule that has been cited.

The sole object of consideration, therefore, is, whether the money arising from the commissions, was advanced by Willing & Morris to G. Inglis, on the faith of his promise, and the credit of the legacy? That fact it is the province of the jury to ascertain and decide: if the affirmative prevails in their minds, the verdict ought to be for the defendants; but if they entertain a contrary opinion, the nominal plaintiffs are entitled to recover.

Verdict for the plaintiff.(*a*)

Innis *v.* Miller.

Competency of witness.

One who expects to be benefited by the result of the cause, though not directly interested, is not a competent witness.[1]

Replevin. The defendant offered Francis Bailey, as a witness; who being sworn on his *voir dire*, said, "that he was a judgment-creditor of the defendant; that he expected, if the defendant recovered, to be paid, at least, a part of his debt; and that he did not know that the defendant had any other property than what was involved in the replevin, to satisfy him; but, on the contrary, he believed that his payment depended on the defendant's recovery." It appeared, likewise, that Bailey was the attorney in fact of the defendant, and in that character, was active in prosecuting this, and other suits.

The admission of the witness was opposed by *Bradford*, *Todd* and *Levy*, who cited *Mc Veaugh* v. *Goods*, 1 Dall. 62. And supported by *Sergeant*, who cited *Abrams* v. *Bunner*.

By the Court.—The law on this subject has been fully settled in the modern cases, by an accurate discrimination between the competency and the credibility of witnesses. The stream of justice should, however, be preserved clear and uncontaminated: and although a creditor is not excluded from giving testimony, as such; yet if he acknowledges an expectation, that he shall be bettered by the fate of the cause (as in the case of *Mc Veaugh* v. *Goods*, which was properly ruled), he is sensible of a positive interest, that must give a bias to his mind. From the answers of the witness, therefore, we must reject his testimony.

(*a*) There was a motion made for a new trial; but on the 26th of August 1790, it was withdrawn, and judgment entered conformable to the verdict.

[1] Overruled, in Long *v.* Bailie, 4 S. & R. 222, where it was decided, to be no objection to the competency of a witness, that he believes himself to be interested in the event of the suit, when, in fact, he is not so. And to the same effect, see Cassiday *v.* McKenzie, 4 W. & S. 282; Erisman *v.* Walters, 26 Penn. St. 467.

*McClenachan *et al.* v. McCarty.

Evidence.

In mercantile cases, a letter of instructions from the owners to the master of a vessel, which is the subject of controversy, is admissible in evidence.

The plaintiffs, in the course of a mercantile correspondence, offered to read in evidence a letter written by them to Capt. Lesson, who was commander of the vessel, about which the controversy had arisen.

But it was opposed by the defendant's counsel; who urged, that it was a letter to a third person, not the agent of the defendant, nor connected with him; that the defendant had never heard of such a letter before, nor had he in any wise enjoyed the opportunity of contradicting its contents; that although it was true, that in the investigation of commercial business, a greater latitude of evidence was admitted than in other cases, yet that this was a transaction between merchants resident here, which was susceptible of the regular proof; and that if the rules of evidence were, under such circumstances, to be waived, it would, in effect, capacitate every one to make evidence for himself.

The adverse counsel contended, however, that in mercantile transactions, the correspondence which has passed between the parties interested, or with persons who have had an agency in the business, has always been deemed good evidence; that the letter now offered was not written *ex post facto*, but is of an old date, antecedent to the existence of any controversy; that where no controversy is in contemplation, the declarations of a party, made at the time, are evidence; and that similar letters had already been introduced into the cause.

Shippen, President.—The defendant has himself given in evidence a letter which he wrote to Captain Lesson. Besides, it is certainly common, in mercantile disputes, to lay before the jury the instructions which are given to masters of vessels. The court think, therefore, that the objection to reading the letter must be overruled.

Rapalje *et al.* v. Emory.

Foreign judgment.

The judgment of a foreign court, in a foreign attachment, adjudging a sum of money in the hands of the garnishee, to belong to the defendant, is a protection to the creditor, who has received it on the footing of such judgment.

There can be no recovery, in an action for money had and received, without proof of some privity between the owner and receiver, or of *mala fides;* or, at least, a receipt of the money, without valuable consideration.

This cause having been argued at large, upon a motion for a new trial, the facts and arguments were recapitulated, and the opinion of the court delivered, in the following terms.

Shippen, President.—The case was shortly this: Reuben Fairchild, in the year 1775, sailed from New York, master of a vessel belonging to the plaintiff and himself, on a circuitous *voyage. He was likewise the factor of the plaintiffs, and had discretionary orders to trade for them, *52]

and to sell the vessel as well as the cargo. In the course of the voyage, he sold both vessel and cargo, and made some remittances to his owners. While he was at St. Eustatius, and when he was about to leave it, he put his affairs into the hands of William Smith, then a merchant there, with power to collect his outstanding debts, among which were four debts due upon note or bond, payable to Fairchild; but which Smith believes arose from the sale of the cargo belonging to the plaintiffs. These notes, together with some other papers, were delivered to Smith, inclosed in a cover, on which Fairchild had made the following memorandum: "Van Bibber & Harrison, Thomas Wallace, Archibald & John Blair, and Thomas McFarran's obligations, are on account of Messrs. Jacob Van Voorhis, Ram Rapalje, and Peter Mercier, merchants of New York, together with outstanding debts; this is in case any accident happens to me."

After Fairchild's departure from St. Eustatius, and in the years 1777 and 1778, Smith collected the outstanding debts; and, among others, those due on the four notes payable to Fairchild. This money remained in Smith's hands until September 1779; when a foreign attachment was sued out by Benjamin Amory, the present defendant, against the effects of Fairchild, in the hands of William Smith, for a private debt of Fairchild due to Amory. Smith appeared to the action, employed counsel to defend it, and on the hearing, the court there confirmed the attachment, and condemned the garnishee to pay to the plaintiff in the attachment the money due to him from Fairchild; which money was accordingly paid, and the present action is brought by Rapalje & Mercier, to recover back from Amory the money so recovered and paid to him by Smith, as for money had and received to the plaintiffs' use.

The principles on which the action is brought are, that the money arising from the notes were really the property of the plaintiffs, and not of Fairchild; that Smith had no money of Fairchild in his hands, but what arose from those notes; and that it was, therefore, wrongfully, and against conscience, received by Amory as the property of Fairchild.

On the trial of this cause, the merits were not at all investigated on the part of the defendant; who suffered a verdict to pass against him, without opposition, relying on the point of law, that he was protected by the judgment of the court at St. Eustatius. This point was, therefore, reserved for the consideration of the court.

It is contended, on the part of the defendant, that his money, having been attached in the hands of Smith, as the property of Fairchild, and on the trial adjudged to be his property, that *judgment cannot be reversed here, in a collateral action. That the judgments of foreign courts [*53 must necessarily bind ours, and be considered as conclusive, at least, in those cases, where the aid of this court is not asked to carry their judgments into effect. And that if our courts were to reverse the judgments of foreign courts, they might reverse ours; which would introduce a kind of warfare between the judicatures of different countries, to the risk of the public peace, as well as to the ruin of the contending parties. To this, it is answered by the plaintiffs' counsel, that however definitive a sentence of a foreign court may be, as between the parties to the suit, it cannot bind third persons. That the present plaintiffs were no parties to that suit, and cannot, therefore,

be bound by any judgment in it; they having had no opportunity of maintaining their right to the property in question.

The discussion of this point, on the argument, led to others not taken notice of on the trial; but which must necessarily be considered by the court on a motion for a new trial.

Great reliance has been had on the part of the plaintiffs, on the manifest equity which they allege appears on their side of the question; and it is contended, that the court ought not to set aside a verdict, upon a point of *summum jus*, where it is not to attain the justice of the case. This has naturally led us to consider the equity, as well as the law, arising upon the case. Taking it up in a general view, there does not appear to us to be any great preponderancy of equity on either side; both plaintiffs and defendants were fair and honest creditors of Fairchild; the plaintiffs intrusted him as their agent, the defendant as his debtor. It was natural and fair for each side to take every legal measure to obtain payment of their demands; and whoever, in such a case, has got a legal advantage, this court cannot say he is not entitled to hold it.

The notes in question were made payable to Fairchild himself; they were put into the hands of Smith for collection; the money, when collected, remained in Smith's hands, above a year, as the money of Fairchild; there was no assignment of these notes to the plaintiffs, in any other way than by indorsing a memorandum on the paper which inclosed them, that in case of accident, they were obligations on account of Rapalje & Mercier, merchants in New York. Smith was the agent of Fairchild, and not of Rapalje & Mercier. When he received the money on the notes, he carried it to the credit of Fairchild, and not to the credit of the plaintiffs. In the receipt which he gave Fairchild for the notes, he promises to re-deliver them to him or his assignees, and no mention whatever is made of the plaintiffs. In his account current with Fairchild, he charges *him* with the amount of divers invoices of goods shipped for him, and credits *him with the money received, as well from some other persons, as from those who gave the notes, and finally strikes a balance in favor of Fairchild. If all these matters appeared to the court at St. Eustatius, as probably they did, it is not much to be wondered at, that they should determine that Smith, as garnishee in the attachment, had effects of Fairchild in his hands.

*54]

In point of law, the court entertained a considerable doubt, whether under the circumstances of the case, an action for money had and received, was at all supportable against the defendant. As the counsel for the plaintiffs appeared sanguine in the cause, we directed a new argument upon this point, and it has accordingly been argued ably and ingeniously; but on full consideration, we must retain our former sentiments, that it cannot be supported. If this had been the case of a specific article, the property in which had been the subject of dispute between Amory and Fairchild, any decision with regard to that property, would certainly not have prevented the plaintiffs, being third persons, not parties to the suit, from supporting an action of *trover*, if they could have shown better right. But the contest in St. Eustatius did not regard any specific property; but was an attachment against the general effects of Fairchild, and the action brought here is not an action of trover, detinue or replevin, for any specific property, but an action for money had and received to the use of the plaintiffs. The dis-

tinction between specific property and money, is well established; in the one case, the true owner will have a right to recover it from any person who is found in possession of it; but in the case of money (the medium of commerce), to enable the party to recover, there must be either, some privity between the owner and receiver, or there must be *mala fides*, an unjust receipt of the money, or, at least, a receipt of it, without a valuable consideration. In those cases, but in no other, the true owner, by identifying the money, and tracing it into the hands of the receiver, may support an action for money had and received, against an utter stranger; and under such circumstances, money is considered in the nature of specific property. This distinction is fully explained by Lord Mansfield in *Clark* v. *Shee*, Cowp. 200.

In this case, there was no privity between the plaintiffs and the defendant; there was no contract, either express or implied, between them; the money was not received as the money of the plaintiffs; the defendant was a creditor of Fairchild, who recovered and received his debt, in a due course of law, by the judgment of a court having jurisdiction of the cause; there was no fraud or collusion, no *mala fides*, no want of consideration; an honest debt was due; and though a distinction has been made between a past consideration, as a debt, and a present consideration given, no such distinction can hold in a case of this sort; as the *mala fides*, which could alone make the defendant *answerable, would be alike wanting in either case. [*55 There seems no difference, in point of fairness, between the defendant's receiving the money under a judgment of court, without fraud or collusion, and his receiving it from the hands of Fairchild himself. If Fairchild had received the money on these notes himself, and paid it voluntarily to Amory, it could not be pretended, that the plaintiffs, although the money ought to have been paid to them, could have any recourse to Amory; for if it might be the subject of controversy, when a man receives a debt, whether the debtor pays it out of his own money or another's, who would be safe in receiving money? The nature of money and the nature of commerce, forbid such an inquiry. The payment by Smith, the agent of Fairchild, was in effect a payment by Fairchild; and its being made in consequence of a judgment of court, could, at least, not weaken the defendant's right of receiving it.

For these reasons, we are of opinion, that the present action is not supportable against Amory, and consequently, that the verdict was against law. The motion for a new trial, therefore, is granted.(*a*)

(*a*) In consequence of this decision, the cause was removed into the supreme court, where the principles contained in Judge SHIPPEN's opinion, were also recognised and established. See *post*, p. 231.[1]

[1] Also reported in 1 Yeates 532, *sub nom.* Messier v. Amory.

COWPERTHWAITE *v.* JONES *et al.*

New trial.—Slaves.

In an action of *tort*, it is not ground for a new trial, that the jurors each set down a particular sum, divided the aggregate by twelve, and returned the quotient as their verdict; in the absence of any fraudulent abuse of the mode adopted.

If the jury in an action upon a bond given for the return of a slave, on a *homine replegiando*, return the value of the negro as the measure of damages, and the amount of the verdict is accepted by the master, this will, in equity, operate as a manumission of the slave.

A MOTION for a new trial having been made and argued in this cause, the President now delivered the opinion of the court, in the following terms.

SHIPPEN, President.—The motion for a new trial in this cause has been made on several grounds: 1st. Because the jury have misbehaved, in adopting an improper mode of estimating the damages; by setting down each the particular sum he thought just, and then dividing the aggregate by the number of jurymen. 2d. Because the damages are said to be excessive. 3d. Because the verdict was contrary to the evidence. And 4th. Because it was founded on a mistake in point of law; the jury supposing that, on payment of the damages, the negro (whose freedom was in question) would be emancipated.

New trials are frequently necessary, for the purpose of attaining complete justice; but the important right of trial by jury requires they should never be granted, without solid and substantial reasons; otherwise, the province of jurymen might be often transferred to the judges, and *they* instead of the jury, would *become the real triers of the facts. A reasonable doubt, barely, that justice has not been done, especially, in cases where the value or importance of the cause is not great, appears to me, to be too slender a ground for them. But whenever it appears, with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages, the court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties.

*56]

The first objection, as to the manner of the jury collecting the sense of its members, with regard to the *quantum* of damages, does not appear to us to be well founded, or at all similar to the case of casting lots for their verdict. In *torts* and other cases, where there is no ascertained demand, it can seldom happen, that jurymen will, at once, agree upon a precise sum to be given in damages; there will necessarily arise a variety of opinions, and mutual concessions must be expected; a middle sum may, in many cases, be a good rule; and though, it is possible, this mode may sometimes be abused by a designing juryman, fixing upon an extravagantly high or low sum, yet unless such abuse appears, the fraudulent design will not be presumed.

The 2d and 3d objections may be considered together. The action is brought upon a bond, given to the sheriff, upon his executing a writ of *homine replegiando*. The condition is for prosecuting with effect, and for making a return, if awarded. The plaintiff discontinued his suit, and no return has been made; of course, if the case was divested of its particular

circumstances, the defendants would be liable for the payment of damages, equal to the value of the thing replevied. The question, then, upon the trial was—whether the circumstances were such as, in justice and equity, ought to discharge the defendants from the legal obligation they were under, to return the negro, or pay the price of him.

Many circumstances were given in evidence; but the most material one in favor of the defendants, was, that when the writ of *homine replegiando* was delivered to the sheriff to be executed, he was instructed by the defendants, or their counsel, not to take the negro out of the possession of the master, but to leave him in his hands, during the dispute; that he was, accordingly, left in his possession, and from thence, it was concluded, that he, the master, and not the sureties, became responsible for him. The evidence upon this point comes from the sheriff himself; who, by consent, was sworn as a witness: he proved the leaving the negro in his master's house, when he executed the writ, and that he did not either take charge of him, or deliver him *from his confinement; but he says, that some short time afterwards, the master brought the negro to his office, to deliver him [*57 up, and he refused to take him; and ordered him to return to his master.

There is some evidence of his being afterwards seen at his master's house; but he has finally abandoned, and has never since returned. In the charge to the jury, the court told them, that though this was an irregular way of executing the writ, yet if they were satisfied, from the evidence, that the negro was actually left in the hands of the master, with *his own consent*, and that he had either expressly or impliedly engaged to take charge of the negro, during the dispute, it would be unjust to make the defendants answerable for him, contrary to the master's own stipulation and agreement; and in that case, they ought to give damages only in proportion to the actual loss of service the master had sustained, through the fault of the defendants.

The evidence, in my opinion, preponderated in favor of the master's acquiescence in the directions given to the sheriff; but the jury appear to have thought otherwise; they probably considered, that when the sheriff went to execute the writ, he did not find the master himself at home; but mentioned his business only to his wife; that there was, consequently, no express acquiescence on the part of the master; that, as to the time he kept the negro, after the service of the writ, from whence an implied acquiescence might be presumed, there was some uncertainty in the evidence; the sheriff who spoke to the time which had elapsed before he was brought to his office, expressing himself with great caution, and not being able to ascertain it with any degree of precision, although he rather thought it might be about a month or six weeks; and that, notwithstanding what had passed, he had actually returned, that he had replevied the negro. They might likewise have balanced the testimony of Israel Jacobs, with that of Thomas Harrison; although, I own, I should have put more reliance on the positive evidence of the latter, than the negative evidence of the former. However, as in this case, there was no direct proof of an acquiescence, but the evidence of it arose from presumption, and inferences drawn from the circumstances attending the case, we think, it was properly with the jury to decide upon those circumstances, and that their verdict cannot be said to have been given contrary to that plain evidence, which ought to induce us to set it aside; although we might not have drawn the same inferences which they did.

As to the supposed mistake in the jury, it must be observed, that as the *homine replegiando* was not prosecuted with effect, the plaintiff having discontinued it, and the negro never returned, the defendants were legally answerable upon their bond; and as the jury were of opinion, there were no such equitable *circumstances, as ought to discharge them from their *58] obligation, the price of the negro was, in that view of the evidence, the proper measure of damages; which, if accepted by the master, will, in equity, and perhaps by operation of law too, emancipate the negro; he having been a party to the *homine replegiando*, and a full satisfaction, equal to his value, made by his sureties for him.

Rue v. Mitchell.

Slander.—Construction.

The sense in which words are received by the world, is that which courts of justice ought to ascribe to them, in slander.[1]

This was an action of slander, for pronouncing the words set forth by the declaration, in the following form, after the general introduction and averments, respecting the plaintiff's good fame and character: "That the defendant published, then and there, the following false, scandalous, lying, English words, of the plaintiff, in the hearing, &c., to wit, You (him, the said plaintiff, meaning) have taken a false oath, before squire Rush (meaning that the said plaintiff had committed the crime of perjury, in a certain oath, by the said plaintiff, then lately taken, before William Rush, Esq., one of the justices of the peace, &c., in and for the city and county of Philadelphia, in a cause before the said justice depending), and I (himself, the said defendant, meaning) can prove it: By reason whereof, &c."

It appeared, on the trial of the cause, that the oath in question was voluntarily taken by the plaintiff, in order to satisfy the defendant upon a controverted fact, involved in the suit depending before the justice, and in which the situation of the present parties was reversed: Mitchell being then the plaintiff, and Rue the defendant.

There was a verdict for the plaintiff, with ——— damages; but the cause was again brought before the court, on a motion in arrest of judgment, which was founded on two grounds: 1st. That the words charged in the declaration did not import perjury, in a legal acceptation of their meaning; and therefore, did not, in themselves, independent of any injurious consequence to the plaintiff, render the speaker liable to an action at law. 2d. That the oath does not appear, in the declaration, to have been of a nature, that by taking it the party could commit the legal crime of perjury.

I. *J. B. McKean*, in support of the motion, observed, that actions of slander ought not to be encouraged; and that they had hitherto been strictly confined to cases, which endanger a man in law; which exclude him from society; which impair the exercise and benefit of his trade or profession;

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[1] Lukehart v. Byerly, 53 Penn. St. 418; Pelton v. Ward, 3 Caines 76; Goodrich v. Woolcott, 3 Cow. 231; s. c. 5 Id. 714; Demarest v. Haring, 6 Id. 76; Carroll v. White, 33 Barb. 615; Wright v. Paige, 36 Id. 438.

or, which may affect magistrates, or other persons employed in public trusts. There is no special damage laid in the declaration; and *to allege, that a man has forsworn himself, generally, is not actionable; because he may be forsworn in common conversation; or, it may be an expression of mere passion and anger (4 Co. 15 *b*), nor shall it be intended to refer to a case where perjury may be committed. 1 Com. Dig. 192. [*59

II. But in the next place, the oath must appear to have been a lawful one, administered in the course of a judicial proceeding, upon a matter material to the issue on trial. 2 Bulst. 150. The oath in question, was merely a voluntary affidavit; and that, too, taken by a man in his own cause; which can never judicially be allowed: the justice could not have compelled him, and ought not to have permitted him, to take it. 1 Hawk. P. C. 174–5; 4 Bac. Abr. 484. For that cause alone, the judgments of justices have often been reversed in the supreme court; and the act of taking or administering, voluntary affidavits, is highly censured by Sir William Blackstone. 4 Bl. Com. 137. Nor, in favor of this species of action, will there be any intendment, that the suit was depending before a proper tribunal. 4 Co. 16 *b*. An *innuendo* is not, in itself, sufficient to show that Rush was a justice, and had authority in the cause. Yelv. 21; 3 Lev. 166; 4 Co. 17; 5 Burr. 2700.

Sergeant, for the plaintiff, arguing in support of the verdict, said, that in modern times, a very salutary change had taken place in the doctrine, respecting actions of slander; which were now liberally encouraged, with a view to the correction of licentiousness, and the preservation of peace. 4 Bac. Abr. 497, 505, 506. Nice exceptions are never allowed to prevail, against a reasonable interpretation and common understanding of the slander. 2 Wils. 87, 114, 300. The words shall be taken in the same sense, as they would be understood by those who hear or read them. Bull. N. P. 3, 4. But as the jury have passed upon the subject, the *innuendoes* must be taken to be true. It is too late, therefore, to contend, that the words do not import a charge of perjury: the verdict establishes that point, and the competency of the jurisdiction of the justice, as well as the malice and falsehood of the slander.

The President delivered the opinion of the court, in the following terms.

Shippen, President.—The sense in which words are received by the world, is the sense which courts of justice ought to ascribe to them, on the trial of actions for slander. Slander imports an injury; and the injury must arise from the manner in which the slanderous language is understood.

The words, in the present case, certainly import a crime; and the *innuendo* (which the jury have found to be true, and which, therefore, must govern our interpretation of the fact) *shows that the reference was not to a matter of common conversation, but to an act committed before a justice of the peace, in relation to a cause actually depending. [*60

Generally speaking, indeed, actions of slander, founded on trifling causes, to gratify a petulant and quarrelsome disposition, will not be encouraged by the court: but when the reputation, trade or profession of a citizen is really affected, for the sake of doing justice to the dearest interests of individuals,

as well as for the sake of preserving public order and tranquillity, every appeal to the tribunals of our country ought to be liberally sustained.

Judgment for the plaintiff.

Price v. Ralston, assignee of Pollard, a Bankrupt.

Factor.—Bankruptcy.

If a factor, to whom goods are consigned for sale, take in payment therefor, the purchaser's bond, in his name, such bond does not pass to the factor's assignee, on his subsequent bankruptcy.

This cause came before the court, on a case stated for their opinion, in the following words: "On the 23d day of March 1784, William Price, the plaintiff, shipped and consigned goods, by the Christian, to William Pollard, the bankrupt, one-half for the account of the said William Pollard; and at the same time, shipped and consigned other goods, by the Prince of Liege, to the said William Pollard, for the same account. And on the 18th day of May following, the said William Price shipped and consigned other goods, by the John, to the said William Pollard, for the same account; and on the 2d day of September, in the same year, shipped and consigned, by the George, to the said William Pollard, other goods, for the same account; and the said William Price, on the 2d day of December 1785, shipped and consigned other goods, to Messrs. Robert Duncan, Jr. & Co., of Philadelphia, being for and on account of the said William Price. The said Robert Duncan & Co., on receipt of them, deposited the said goods in the hands of the said William Pollard, for account of the said William Price. Considerable sales of the above-mentioned goods were made, from time time to time, by the said William Pollard, and moneys received for the debts outstanding on account of the said sales; the said Pollard, at different times previous to his becoming a bankrupt, as hereafter mentioned, took from some of the debtors, bonds, payable to him, the said William Pollard, and not expressing his capacity of agent for the said Price. A commission of bankruptcy issued, the 28th day of June 1787, against the said William Pollard, and on the 29th day of June 1787, he was declared a bankrupt. At the time he was so declared a bankrupt, he had no specie, proceeding from the said sales, in his possession, separated and distinguished from specie belonging to *himself. *61] The commissioners of bankruptcy appointed the said Robert Ralston, assignee. Part of the above several parcels of goods were sold by the said William Pollard, previous to his bankruptcy; who, also, previous to his said bankruptcy, received part of the money for which they were sold; the debts due for others of them were outstanding at said time, and part of each of the said several parcels, at the time of the said bankruptcy, were in the hands of said bankrupt, and were taken possession of by the said Robert Ralston, as assignee, and by him sold.

Query 1st. Is not William Price entitled to a moiety of the outstanding debts, not reduced to bond or note, due from the goods shipped as aforesaid, on his and said William Pollard's account, each one-half?

2d. Is he not entitled to a moiety of the sales, made by said Robert Ralston, of the said goods, shipped as aforesaid, on said William Price's and William Pollard's account, each one-half; which came to the said Robert Ralston's hands, as assignee, and which he has sold since?

3d. Is not the said William Price entitled to the whole of the outstanding debts, not reduced to bond or note, due for the goods shipped to Messrs. Robert Duncan, Jr. & Company, and which were deposited with the same William Pollard, and sold by him, previous to his bankruptcy?

4th. Is not the said William Price entitled to the whole of the moneys proceeding from the sales of said last-mentioned goods, which were in William Pollard's hands, at the bankruptcy, and which the said Robert Ralston took as assignee and sold?

5th. Is William Price, or is the assignee of William Pollard, entitled to recover and receive the moneys aforesaid, due upon bond payable to William Pollard, without describing him as agent or attorney for William Price?

Four of the questions being voluntarily yielded to Price's claim, the fifth was argued in favor of the plaintiff, by *Rawle* and *Todd;* and in favor of the defendant, by *Ingersoll* and *Coxe.* It turned principally on the comparative meaning and construction of the following sections, in the statutes of 21 *Jac. I., c.* 19, and in the act of Pennsylvania for regulating bankruptcy.

"And for that, it often falls out, that many persons, before they become bankrupts, do convey their goods to other men, upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose of the same as their own: Sect. 11. Be it enacted, that if, at any time hereafter, any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alienation or disposition, *as owners, that in every such case, the said commissioners, or the greater part of them, shall have [*62 power to sell and dispose the same, to and for the benefit of the creditors, which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt." 21 *Jac. I., c.* 19, § 11.

"And be it further enacted, &c., that if any persons shall become bankrupt, and, at such time, by consent of the owner, have in their possession and disposition, any goods whereof they shall be reputed owners, and take upon them the sale or disposition, as owners, the commissioners shall have power to sell the same, for the benefit of the creditors, as fully as any other part of the estate of the bankrupt." 2 Dall. Laws, 376, § 20.

For the *defendant* (whose counsel opened the case), two points were made: 1st. That by the bankrupt law of this state, all the property of a bankrupt, whether in possession or in action, or of which he was reputed owner, at the time of the bankruptcy, vests in the commissioners and assignees. 2d. That even if the law thus stated, might be deemed too general, and not applicable to the case of factors, executors, &c., yet, where the specific lien of the principal, upon goods consigned on his account to a factor, is destroyed by sale, or otherwise, he can only come in for a dividend, with the general creditors, upon the bankruptcy of the factor.

1st Point. There is a material difference between the analogous clause in the 21 *Jac. I., c.* 19, § 11, and the 20th section of the act of Pennsylvania, 2 Dall. Laws, 370 (2 Bl. Com. 485). For the latter has no preamble to explain and mark its meaning, as the English statute has, and, on the construc-

tion of which, all such effects are expected, from the sale of the bankrupt's goods, as he held *en auter droit.* Thus, in 3 Burr. 1369, Lord Mansfield, proceeding, doubtless, on the ground of the preamble to the statute, says, "if an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even in *money*, which specifically can be distinguished, and ascertained to belong to the testator, and not to the bankrupt himself." But the meaning of the act of assembly, unqualified by any introductory explanation, must rest entirely on the words of the section; and those clearly embrace all the property of the bankrupt, of which he was actual or reputed owner at the time of his failure.

2d Point. But whatever way that question may be decided, it was urged, that the specific lien of the plaintiff was destroyed by the sale, before Pollard became a bankrupt. Bull. N. P. 43. It is true, that if the goods had remained in specie, the plaintiff's lien would have excluded the claim of the general creditors (2 Ves. 585; 2 Atk. 623; 1 Id. 234); but as they were *63] *actually disposed of, the lien was lost; and even the simple-contract debt had been extinguished, by taking bonds from the vendee, not in the quality of Price's agent, but in Pollard's own name. If a factor sells goods for a principal, he may bring an action in his own name, or the action may be brought in the name of the principal, against the vendee. 1 Atk. 248. But when the debt is reduced to a bond, the principle of the case no longer operates; the commercial relation of the parties is at an end, and the action can only be brought in the name of the obligee. In *Geyer* v. *Smith's Administrator*, it was held, that the lien of a creditor upon the intestate's estate was destroyed by his taking a bond from the administrator; and that the obligor's calling himself administrator, in the bond, was surplusage; since he could be chargeable only in his own right. 1 Dall. 347 *n.* And in *Cummings* v. *Lynn*, the court adjudged that the assignment of *cestui que trust*, was not a valid assignment, within the act of assembly. 1 Dall. Laws, 107; 1 Dall. Rep. 444. If a factor dies insolvent, the principal has no lien on the money or effects in the hands of the administrator or executor; and it would be a *devastavit*, to satisfy his claim, in the first instance, if there were debts of a higher nature. 13 Vin. Abr. tit. "Factor," 5.

But an attorney in fact or agent may release the debt. 1 Dall. 449. And if he may release the debt *in toto*, he may in part: nor, if he exceeds, in so doing, his authority, will that impair the rights of an innocent purchaser or releasee, though it will render him personally liable to his principal; as he would be, by giving further day of payment, whether the contract or security was under seal or not. Suppose, then, Pollard had legally assigned the bonds for a valuable consideration, would the assignees *ad infinitum* be mere trustees for Price, though without notice of his claim? Or, independently of any bankruptcy or assignment, would it have been in the power of the administrator of the obligor, to class Pollard's debt merely with the debts of simple-contract creditors? To maintain the affirmative of either of these points (which indeed the adverse counsel must endeavor to maintain), will be attended with inextricable embarrassment and mischief. Bankruptcy is equivalent to payment. Cowp. 472. And the assignees of a bankrupt stand precisely in the shoes of a bankrupt. 1 Atk. 233. But what shall be deemed the rights of the bankrupt would, by the success of the opposite doctrine, become matter of incessant doubt and litigation; and

the assignees would, at every step, be entangled in the difficulty of understanding, for whose use his name has been employed.

For the *plaintiffs*, it was stated, that Pollard was placed in two situations—in one, being half-part owner of certain shipments; *and in the other, being merely the factor of shipments, made originally to Robert [*64 Duncan & Co., on the sole account of Price, the plaintiff, but delivered over by them to Pollard, on the same account. And it was contended: 1st. That if the joint shipments remained in specie, or if the goods were sold, but no money paid, or bonds or notes taken for the value, so that the property could be specifically traced, Price was entitled to his moiety: And 2d. That Price was entitled to the whole of the goods, or their proceeds, in the case of the shipments made for his sole use. But considering the subject in the order pursued by the defendant's counsel—

On the 1st point, it was observed, that the resemblance between the statute of *James I.*, and the act of assembly, is so strong, that the latter may almost be said to be a copy of the former. In both, it was obviously the design of the legislature, to transfer the actual property of the bankrupt, and nothing more, to the general benefit of his creditors; unless, indeed, in the case of a sale made by the bankrupt, and the goods being afterwards allowed to continue in his possession and use. The 20th section of the act, it is true, is not introduced by a preamble, similar to that which is contained in the English statute; but the general preamble to the whole act must be taken as having some relation to all the parts; and that is sufficiently explanatory of the legislative meaning on the present subject. Though, therefore, the clause is unrestrained in terms, and seems to extend to all the goods in the bankrupt's possession; yet this latitude of expression must be controlled by the decisions on the statute of *James*; for there is no material variance between the two laws; and under the statute of *James*, though the bankrupt is in possession of the goods, if he is only empowered to dispose of them in trust for another, they are not liable to the bankruptcy, either in law or equity. 1 P. Wms. 314. Even at common law, indeed, the vendor of goods, which still remained in his possession, might give a sufficient title to a second vendee; for it shall be presumed, as to all other persons but the parties to the first contract, that, with the possession, he still retains the property. The case of factors, however, has been excepted from the statute of 21 *Jac. I.*, contrary to the express words, for the sake of trade and merchandise (1 Atk. 232; 2 Ves. 585; 1 T. R. 619); and the same principle will produce the same consequence, in construing the act of Pennsylvania. The case in 1 Atk. 174, 1 Ves. 365, could not have been saved by the preamble of the statute; but only by the general principle, which is the same here, as in England, of protecting a trust unaccompanied by fraud. Cowp. 232. Goods left to sell, with one who sells on commission, are not within the statute. Bull. N. P. 262. The trust of factors is definite; *their powers are limited: As, for instance, they cannot pledge the goods of their [*65 principal for their own debts. 2 Str. 1178. And such great injustice would be the result of the opposite doctrine, in the case of bankruptcy, that the court will not, without absolute necessity, sustain it.

On the 2d point, it was said, that the doctrine of extinguishment was irrelevant; for it could not be doubted, that if a bond was taken in dis-

charge of a precedent debt, no suit could afterwards be maintained on the original simple contract; and the only question is, whether the property of the principal can be sufficiently distinguished from the property of the bankrupt, to entitle him to the benefit of a lien upon his own goods. If it can be so distinguished, even money shall be delivered to him. 1 Atk. 172. However, there is no claim made by Price, when the whole money was received before Pollard's bankruptcy; but if a factor, having sold goods of his principal on credit, either by way of book-debt, or for notes, afterwards becomes bankrupt, and his assignees receive the price of the goods, or the amount of the notes, it shall be for the use of the principal. 1 Salk. 160; 1 Ves. 363. There is no reason to discriminate between the case of credit given generally, or upon a note; and credit given upon a bond. In numerous instances, there may exist such a lien upon *choses in action*, as will constitute the receiver of them a mere trustee. 1 Ves. 363; 1 Atk. 234; 2 Ves. 586, 674. And such things as a bankrupt holds as trustee, will not pass under the commission. 1 T. R. 619. The principal has a controlling power over the debts due upon the contract of his factor. Bull. N. P. 130. And as long as the debts are not paid, they may be traced, distinguished and ascertained, in favor of his lien. Thus, where a factor took an obligation in his own name, for the price of goods intrusted to him to sell, and afterwards died, the transaction was traced to its source, and the claim of the constituent, who owned the goods, was preferred to the claim of the obligee, administrator. 2 Ld. Kaim. P. Eq. 19; 2 Vern. 638; 13 Vin. 5; 1 Atk. 245, 248. In the case of *Mc Carty*, surviving partner of *Cummings*, v. *Nixon*, the same point was adjudged in the supreme court after considerable discussion and deliberation.(*a*) The principle as to *the administrator
*66] of an intestate, applies, with equal force, against the assignees of a bankrupt; who can only claim in the same manner that the bankrupt might have claimed. Price might have used Pollard's name, to recover upon the bonds, before the bankruptcy; and if his property can be fairly ascertained, he may do so still. It is true, that where a man purchases, without notice of a trust, his purchase shall be held discharged from it: but the supreme court has decided in *Mc Cullough* v. *Houston*, that notes or bonds are taken by the assignee, subject to the same equity as the assignor. 1 Dall. 444.

(*a*) In the case of McCarty, surviving partner, *v.* Nixon, it appeared, that the plaintiff and his partner were merchants, established in France; that having sold considerable quantities of wine to various persons in this country, Cummings, the deceased partner, came hither to collect the debts; and accordingly, obtained promissory notes, in his own name, for many of them; that before the notes became due, Cummings died, and Nixon, the defendant, took out letters of administration upon his estate, by virtue of which he received and recovered the money payable on the promissory notes; that soon afterwards, McCarty, the plaintiff, came to America to settle the affairs of the company, and demanded the amount of the money received by Nixon upon the promissory notes; but that Nixon refused to pay it over, contending, that as administrator, he was bound to discharge the debts of Cummings, according to a legal priority; and that if he complied with McCarty's demand, he would be liable, as for a *devastavit*, should debts of a higher nature appear. The Court, however, held, that the surviving partner, being responsible for all the company debts, was entitled to recover all the company credits; and that Nixon must be considered as having received the money in trust for him The same principle is recognised in Wallace *v.* Fitzsimmons, 1 Dall. 248.

And although there is no court of chancery in Pennsylvania, equity makes a part of the law of the state, according to which the judges will decide in order to prevent a failure of justice. 1 Dall. 213, 214.

The court having held the cause for some time under advisement, the President delivered their opinion as follows.

SHIPPEN, President.—The four questions, first in the order of statement, in the case submitted to the opinion of the court, having been candidly given up by the counsel for the defendant, it only remains to consider the fifth point; which involves an inquiry, whether, by the bankrupt's selling the goods, as the plaintiff's factor, but taking a bond for the money in his own name, the nature of the original demand is not so altered, that it shall attach to the general mass of the bankrupt's property, and be held by his assignees, in exclusion of the plaintiff's claim? In other words, whether the plaintiff retains such a legal or equitable right to the bond, or to the money arising from it, as will enable him to maintain an action against the assignees, if they have received the amount?

The legislature in adopting, not only the general spirit, but frequently the very words of the bankrupt law of England, have wisely saved the expense and trouble of settling many questions, which might, otherwise, have occurred for litigation, *on the introduction of a new and intricate system. Of this description is the clause now in question. The [*67 general words, that "if any person, at such time as he shall become bankrupt, shall, by the consent of the true owner, have in his possession any goods, whereof he shall be reputed owner, the commissioners shall have power to sell the same, in like manner as any other part of the bankrupt's estate," are transcribed from the statute of the 21 *Jac. I.*, *c.* 19; and have received, in England, an ascertained construction highly favorable to commerce. The goods meant by the statute, are there judicially interpreted to be such goods, as the party to whom they really belong, suffers the trader to sell as his own; and not such as the trader has a bare authority to sell, in the character of a factor, for the use of the principal who employs him. The same construction must prevail here, for the enacting words are the same; and although the section of one law is not preceded by a preamble, it is certain, that many of the decisions in the courts of Westminster are made without adverting to the preamble which precedes the analogous section in the statute of *James*.

The argument, however, which has been chiefly relied on by the defendant's counsel, is, that by taking a bond for the debt of the principal, the factor has rendered the property his own, and is merely answerable personally to his constituent. But on this point, likewise, we entertain not the least doubt. Wherever the property of the principal can be specifically distinguished from the property of the factor, it has been uniformly determined, that the right of the former shall prevail over the possession of the latter. If, indeed, a factor sells the goods consigned to him, receives the money due upon the sales, and mixes it, indiscriminately, with his own cash, there cannot, from the nature of the thing, be any subsequent distinguishment, any specific appropriation of property. But if the factor sells on credit, and does not afterwards actually receive the money; or if, having received the money, he vests the amount in other effects, for the use of the principal; or if, upon the sale, he takes notes in his own name, for the price

of the goods—in all these instances, the property of the principal is clearly separated from the factor's; and being thus distinguished, and distinguishable, it must, upon the principles of law and equity, be appropriated, upon the factor's bankruptcy, to the individual use of the principal; it cannot be applied by the commissioners to the benefit of the general creditors.

But it has likewise been contended, that the factor's taking a bond, may be distinguished from the case of taking a note; as the bond extinguishes the simple-contract debt, but the note *does not. The extinguishment of a book-debt, by receiving a security of a higher nature, may vary the mode of recovery, but cannot alter the right. The money due upon the bond, is still the money of the principal; and he has an unquestionable right to employ the name of the obligee, in an action to recover it. If, indeed, in the case of negotiable notes (which are to many purposes considered as money), the sum due upon them shall still be deemed to be the property of the principal; there seems a stronger reason that the rule shall operate in the case of bonds, which, even in Pennsylvania, are instruments of a less negotiable nature than notes.

*68]

Upon the whole, we are of opinion, that the law is clearly in favor of the plaintiff.[1]

Woglam v. Cowperthwaite.

Distress.—Replevin.

Where goods are distrained for rent, and replevied, the distrainor retains no lien thereon; he cannot subsequently take them, by virtue of a *retorno habendo*, out of the possession of a stranger, who has acquired a valid lien thereon.

***It seems*, that by the custom of Pennsylvania, a distrainor may impound the distress upon the premises, during the five days allowed for replevying the same, in analogy to the statute of 11 *Geo. II.*, *c.* 19, though that clause of it is not incorporated in our act of assembly.**

This was an action brought against the sheriff of Philadelphia, for taking goods by virtue of a writ *de retorno habendo.* The facts were as follows: One Cresson distrained goods of Hamilton, for rent due to Samuel Emlen; Hamilton replevied the goods, and gave security to the sheriff, in the usual form; he afterwards moved, with his goods, into the house of the plaintiff, who, after rent had accrued to him, distrained the goods; Hamilton, the next day after this distress, removed the goods from off the premises; they were followed by the officer, who made the second distress, and he had them appraised in the house to which Hamilton had removed them; shortly after this appraisement, and while the goods remained where they were appraised,

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[1] So long as trust property can be traced and distinguished, it is liable to the claims of the *cestui que trust;* but the right of reclamation is at an end, when the subject-matter has been converted into money, and mixed with other funds. Thompson's Appeal, 22 Penn. St. 16; s. p. Reed's Appeal, 34 Id. 207; Robb's Appeal, 41 Id. 45; Keener v. Cross, 65 Id. 303; Kepler v. Davis, 80 Id. 153. And moneys held in a fiduciary capacity require no ear-mark, if not mingled with those of the trustee. Cox's Estate, 5 W. N. C. 474; Jordan's Appeal, 10 Id. 37. Otherwise, if trust-moneys have been mixed with other funds, so as to be incapable of identification. People's Bank's Appeal, 93 Penn. St. 107; Schneider's Estate, 11 Phila. 71. Equity will follow a trust-fund, through every transmutation, if the right of a *bonâ fide* purchaser, without notice, does not intervene. Sadler's Appeal, 87 Penn. St. 154; Sheetz v. Marks, 2 Pearn. 302.

the defendant in the first replevin obtained judgment for his rent, and issued a *retorno habendo;* by virtue of which, the sheriff took the goods, and delivered them to Cresson, who sold them at public vendue.

The question submitted to the court was, whether the goods were liable to be taken under the *retorno habendo*, in preference of, and so as to exclude, Woglam's distress? Or, whether, by the removal of the goods by Hamilton, the lien on the property acquired by Woglam's distress, was not defeated, as against Emlen?

The President, after recapitulating the above facts, delivered the opinion of the court.

SHIPPEN, President.—The first point which arises on the case, is, whether there was any subsisting lien in favor of the first distrainor, the goods having been replevied and security given?

Whatever doubt there might have been before, as to this question, it appears to be now settled by the case of *Bradyl* *v. *Assignees of Bradbury*, in 3 Brown's Reports in Chancery 427, that no lien remained in the distrainor. By the replevin, the securities in the bond are substituted in the place of the goods, which are restored to the tenant, as his sole property; he may sell them; they may be taken in execution; and they become liable to any future lien or incumbrance. Upon the *retorno habendo*, if the identical goods distrained, are found in the hands of the tenant, undisposed of and unincumbered, they may be taken by the sheriff; if not, after an *elongata* returned, a *withernam* may go against the general goods of the tenant. [*69

As to the removal of the goods by the tenant, and the subsequent appraisement, it will be proper to take notice of the alterations made in the common law, by the statutes in England, and our act of assembly.

Distresses for rent being, at common law, in nature only of pledges, the distrainor had no power to sell or dispose of them, until the statute of 2 *W. & M.*, *c.* 5, § 2, which directs that, if upon a distress made, the tenant did not, in five days after, replevy the same, the person distraining might, with a proper officer, cause the goods distrained, to be appraised, and after such appraisement to be sold. The statute of 11 *Geo. II.*, *c.* 19, makes it lawful for the distrainor to impound the distress on the premises, and there to appraise, sell and dispose of them. Our act of assembly pursues, in general, the directions of the statute of *William*, and contains some of the clauses of the latter statute, but omits that which empowers the landlord to impound on the premises; the usage, however, has been, both before and since our act of assembly, to impound on the premises, agreeable to the directions of the act of *Geo. II.*[1] Whether that usage will amount to an adoption of the statute, need not be considered in the present case, because the goods did not remain upon the premises, that length of time, which the statute requires, to give the landlord a right to appraise and sell them, without a removal; but it is material to consider, whether, under our act of assembly he might not legally leave them on the premises, for the space of time which he appears to have done. The clause in the statute of *William*, before recited, is transcribed, almost *verbatim*, in the act of assembly.

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[1] See Waitt v. Ewing, 7 Phila. 195.

The case of *Griffin* v. *Scott*, in 2 Str. 717, was determined many years previous to the statute of 11 *Geo. II.* It was an action of trespass against a landlord, for entering his house, and keeping possession of his goods for eight days. The defendant justified, under a distress for rent: and the court say in that case, that the defendant ought to have removed the goods at the five days' end, but having kept them for eight days, he was a trespasser for the other three days. This implied strongly, that the construction of the statute of *William* was, that the distrainor might leave the distress on the premises, *for five days, mentioned in the act, that the tenant might have the opportunity of replevying them, in the same plight in which they were when distrained. If that was the construction of the statute of *William*, the like construction will hold under our act of assembly, which follows the words of the statute. Even at common law, goods distrained might be left on the premises, for a reasonable time. In the present case, they were left but one day, before they were removed by the tenant himself, and they were quickly followed, and appraised in the house to which they were removed. By the act of assembly, they could not be appraised, until five days after the distress; they were actually appraised, within eight days, though clandestinely removed by the tenant, in the mean time.

*70]

By the common law, in the case of a pound-breach, by the owner of the goods, the distrainor may have his action *de parco fracto*, or may take the goods distrained wherever he finds them, and impound them again. Co. Litt. 47 *b*; 1 Roll. Abr. 674; 12 Mod. 661. The following the goods and making the appraisement, in so short a time, under the directions of the officer who made the distress, was all that could be reasonably expected from the landlord, who ought not to be defeated of his remedy, by the unlawful act of the tenant. If not defeated as against the tenant, he could not be defeated as against the first distrainor, who had no better right than the tenant himself had, unless his original lien had continued. The judgment for a return, in favor of the first distrainor, the issuing the writ of *retorno habendo*, and the taking of the goods under it by the sheriff, were all subsequent to the second distress and appraisement, and before the distrainor could by law expose them to sale. We, therefore, think, there was no default in him, that the goods were *in custodia legis*, subject to his lien, and were, consequently, wrongfully taken by the defendant, under the writ of *retorno habendo*.

Powell *v.* Biddle, administrator *de bonis non, &c.*, of S. Mifflin.

Parol evidence.— Will.

Parol evidence is admissible, to show the person intended, to whom a bequest has been made by a wrong Christian name.[1]

This was an action of debt to recover a legacy, under the following circumstances. The testator, by his last will and testament, bequeathed "unto his friend *Samuel* Powell (son of Samuel Powell, of the city of Philadel-

[1] S. P. Domestic and Foreign Missionary Society's Appeal, 30 Penn. St. 425; Cresson's Appeal, Id. 437. But see Appel v. Byers, 38 Leg. Int. 479.

phia, carpenter), the sum of 100*l.* in specie, to be put out to interest by his executors; the whole principal and interest to be paid to the said *Samuel* Powell, when he shall attain twenty-one years of age; but in case he shall depart this life, in his minority, or before the said legacy be paid to him, then the same to sink into the residue of the testator's estate, &c."

At the trial of the cause, evidence was offered, *and admitted, to show, that though the legacy was bequeathed to *Samuel* Powell, it [*71 was, in fact, intended for the plaintiff, whose Christian name is *William:* and a verdict was, thereupon, allowed to be taken in favor of the plaintiff, for the principal sum and interest; subject to the opinion of the court, on a rule to show cause why there should not be a new trial. The facts proved were, that *William*, the plaintiff, had attained the age of twenty-one years; that he was the younger son of the testator's deceased daughter, who had been married to Samuel Powell, the carpenter, named in the will; that he was well known to the testator; and that the testator usually by mistake, or by way of nickname, called him *Samuel;* but that Samuel Powell, the carpenter, had another son, a mason, whose name was actually *Samuel*, the issue of a second marriage, and with whom the testator had no connection or acquaintance whatever.

On arguing the motion for a new trial, by *Ingersoll*, for the plaintiff, and *Mifflin*, for the defendant, it was agreed on both sides, that the misnomer was merely a mistake; but, nevertheless, it was contended for the defendant, that the evidence to prove it, ought not to have been admitted; for whatever might be the diversity of decisions, under other circumstances, it was alleged, that in no instance had a legacy been awarded, contrary to the express designation of the will, when a person of the name and description of the legatee existed, capable of taking the bequest. Parol proof can never be allowed, to supply the intent of the testator, in a trial before a jury; though it is sometimes received, on questions before the court, to inform the consciences of the judges. 1 Eq. Abr. 230; 3 Chan. Rep. 176; 2 Atk. 215; 3 P. Wms. 253, 254; 9 Mod. 11; 2 Vern. 98, 252, 337, 625, 506; 2 Freem. 52, 60; 8 Vin. Abr. 198, 39. Nor will evidence ever be admitted to contradict a will; though, in cases of necessity, it may be received, to ascertain a person meant, where there are two persons of the same name, or where a man has been usually called by a nickname. 2 Atk. 239, 372; 2 P. Wms. 141.

For the *plaintiff*, it was said, that the rule which excludes the interpretation of deeds and wills by evidence *dehors*, must, like all general rules, be liable to reasonable exceptions. If, for instance, a resulting use would arise by implication, parol testimony may be admitted to rebut the implication. So, likewise, in the case of an executor, the intention of the testator respecting the disposition of his residuary personal estate, may be proved by extrinsic evidence. If, however, the controversy arose upon the will itself, the court would, probably, be inclined to confine their construction to the terms of the instrument; but when the difficulty proceeds from a fact, independent of the will, it must be obviated by the ordinary means, employed *to elucidate any other doubtful point. Suppose, a man were to live [*72 many years under a fictitious name, which happened to be the real name of another person in the same community, could he not take a legacy,

under the fictitious name? Could he not, likewise, take it, after assuming his proper name? And if so, does not the claim depend on a fact *dehors* the will, which must be established by independent proof? The present dispute, in the same manner, resolves itself into this question, whether evidence may not be given, in the case of two persons of the same family, one called *William*, and the other called *Samuel*, that the testator knew the latter, though he did not know the former? And, consequently, that the legacy given, by a mistake of names, to the person he did not know, was intended, in fact, for the person he did know, who in the bequest is emphatically called his friend? It is admitted, from the authorities cited by the opposite counsel, that where there is not a person of the name mentioned in the will, explanatory evidence may be given of the testator's intention; and that if Samuel had not existed, William might have enjoyed the benefit of the legacy, under Samuel's name. But the principle extends further than that admission; and as between William and the testator, an obvious mistake ought not to be enforced, against all the truth and justice of the case. In P. Wms. 141, both the Christian name and surname of the legatee were mistaken; and there were other persons capable of taking the legacy; yet the decree was favorable to the party intended, though not designated, by the bequest. All the authorities, indeed, concur in that point, that no injury can arise from admitting parol proof to ascertain the thing, or person, described by the testator. Rich. Law of Wills 163, 279, 281; 2 Vern. 593; 8 Vin. Abr. 197; Ca. in Eq. 212.

SHIPPEN, President.—The court entertain no doubt in this case; and, therefore, ought not to postpone a decision. The bequest was made to a person who was always called *Samuel* by the testator, though, in fact, named *William;* and whom the testator had nurtured and educated from his infancy; when on the other hand, he did not even know the person really called Samuel. The evidence to explain those facts was proper to be laid before the jury; and their verdict perfectly accords with the law and equity of the case. Therefore—

Let the rule be discharged.

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*73] *LAWRENCE *v.* DOUBLEBOWER.

Justices of the Peace.

Justices have no jurisdiction of an action of trespass for taking the plaintiff's goods.[1]

THIS was an appeal from the decision of a justice of the peace, in an action of trespass, brought before him, against a constable, for wrongfully taking the goods of the plaintiff; and in which judgment had been given for 9*l.* 18*s.*

Roberts, for the plaintiff, and *Bradford*, for the defendant, submitted the case to the court, without argument, upon this single question, whether a justice of the peace has jurisdiction in actions of trespass, for taking goods?

SHIPPEN, President.—Actions of *trover* are expressly excepted from the jurisdiction of justices of the peace; and this being such a trespass, as might

[1] This jurisdiction has been conferred by the act of 1814. 6 Sm. Laws 182.

be made the foundation of an action of *trover*, is fairly within the reason of the legislative exception. The powers of the justices of the peace are, perhaps, already sufficiently great; but, at all events, it would be highly dangerous to extend them to cases like the present.

SEPTEMBER SESSIONS, 1790.

McCoombe v. Dunch *et al.*, Executors of Hudson.

Foreign attachment.

A foreign attachment does not lie against executors.[1]
The credits of a firm cannot be attached for the private debt of one of the partners.[2]

Foreign attachment, in case, to September Term 1785. The plaintiff in this cause having died since judgment was entered, *Wilcocks* obtained a rule that John Ashley and Thomas Stewardson, his administrators, show cause why the judgment should not be set aside, and the attachment dissolved. *Serjeant*, accordingly, appeared for the administrators, and the following case was stated for the opinion of the court:

"The attachment was laid in the hands of Caleb and Amos Foulke, William Moore, Esq., Curtis Clay, Owen Jones, Samuel Pleasants, Joseph Swift and Willing & Taylor, as garnishees. At the time of the attachment being served, or at any time since, the garnishees did not owe any sum of money to the executors of Hudson, in right of their testator: but the said William Moore, Esq., was indebted, and also the said Caleb and Amos *Foulke, as copartners, were indebted, and the said Curtis Clay, Owen Jones, Samuel Pleasants, Joseph Swift and Willing & Taylor, [*74 at the time of the said attachment being laid in their hands, respectively, were indebted, in large sums of money, to Sandiforth Straitfield, as surviving partner of Thomas Fludyer, Samuel Marsh and Giles Hudson. The debt demanded by the plaintiff, in this attachment, was originally due to him from Giles Hudson, deceased, in his lifetime, in his private and separate right, and a judgment was recovered in the court of king's bench, at Westminster, in England, for the same, by the plaintiff against the present defendants, as executors of the said Giles Hudson, upon which judgment the said plaintiff has declared in an action of trespass on the case, in the said attachment."

The motion to dissolve the attachment was made on behalf of Sandiforth Straitfield, the surviving partner of Hudson, and supported upon two grounds: 1st. That a foreign attachment will not lie against executors; and 2d. That the partnership credits of Straitfield & Hudson cannot be attached to answer the separate debt of Hudson.

On the 30th of October, The President delivered the opinion of the court in favor of the surviving partner, upon both points; and accordingly, the rule was made absolute.

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[1] Pringle *v.* Black, *post*, p. 97; Williamson *v.* Beck, 8 Phila. 269.

[2] But see Morgan *v.* Watmough, 5 Whart 125; Lucas *v.* Laws, 27 Penn. St. 211.

BRAILEY *v.* MILLER.

Costs.

Where the plaintiff's recovery is reduced by a set-off, to a sum within the jurisdiction of a justice, he is entitled to costs.

THIS action was brought to recover a debt exceeding 10*l.*, but upon being referred, the debt was reduced by a set-off, and the report of the referees was for no more than 8*l.* As the plaintiff had not previously filed an affidavit of his belief, that the sum due exceeded 10*l.* (agreeable to the provision of the 13th section of the act of the 1st March 1745), *Bankson* contended, that he was entitled to recover costs. 1 Dall. Laws, 308; 2 Id. 364.

Howell, for the plaintiff, said, that if this action could not have been brought before a justice of the peace, his client was ,of course, entitled to costs. The demand, in fact, amounted to 20*l.*, although it was liable to a defalcation; and it could not be known whether the defendant would elect to set off his debt, in the present action, or to make it the foundation of a separate suit. If the defendant had been sued before a justice, and declined making a set-off, the plaintiff could not bring his debt within the justice's jurisdiction, and must, consequently, have been nonsuited there; and it would be an intolerable grievance, to subject him to costs here, merely because his adversary, after *the action was instituted, determined to take advantage of the defalcation. The act of assembly meant only to impose costs on the plaintiff, where the defendant actually owed no more than 10*l.*, at the time of bringing the action; which was not the case before the court. 1 Dall. 308.

*75]

On the 11th of September, the President delivered the opinion of the court.

SHIPPEN, President.—The question to be decided is, which of the parties shall pay the costs, the plaintiff having recovered less than ten pounds. The 5*l.* act provides, that where the person suing shall obtain a verdict or judgment for debt and damages, which, without costs of suit, shall not amount to more than 5*l.* (not having filed an oath or affirmation, before the issuing of the writ, that he truly believed the debt due, or damage sustained, exceeded that sum), he shall not recover any costs. The act extending the jurisdiction of justices to cases not exceeding 10*l.*, refers to all the provisions of the preceding law.

The intent of the legislature was, to prevent the bringing actions in this court, for debts within the cognisance of the justices, by imposing the payment of costs on the plaintiff, unless he had previously filed an affidavit, that he believed his demand exceeded the specified sum. This provision, however, must be confined to the plaintiff's own demand, and not extended to the case of set-offs, which the defendant may, or may not, at his pleasure, defalk. The demand in the present case, was ostensibly above 10*l.*; though it was in the power of the defendant either to reduce it, or not, by setting up his counter-claim. The plaintiff could not, therefore, sue before a justice, because the defendant might there lie by; and if afterwards he was liable to be defeated in the common pleas, he would, in fact, be punished in

costs, for resorting to the only court in which his action could be maintained.

Wherever, therefore, an action is brought for a debt above 10*l.*, and the amount is reduced below that sum, by a set-off, we think the plaintiff ought not to be charged with the costs.

Judgment for plaintiff, with costs.[1]

HOWELL *et al.* v. WOLFERT.

Execution.

An estate for life cannot be extended; the tenant's interest may be sold, without an inquest.

IN this case, the sheriff had levied on a house and lot, by virtue of a *fi. fa.*; and an inquest was held, which declared the rents of the estate sufficient to pay the debt in seven years: but in the return of the *fi. fa.*, it was stated, that the defendant had only a life-estate in the premises. 1 State Laws, p. 6, 49, 50.

On a motion made by *S. Levy*, to quash the inquest, the point submitted to the consideration of the court, was, whether an inquest ought to have been held on a life-estate, under the provision *in the act of assembly, that if real estate taken in execution was found sufficient to pay the debt in seven years, it should not be sold. [*76

Bankson, for the defendant, said, that the question was, in fact, whether a life-estate could be extended, under the act of assembly, or under the law of *elegit* in England; and whether the former referred to the practice under the latter? He urged, that the advantages and disadvantages involved in the discussion, were equal; for, if, on the one hand, a life-estate was liable to be suddenly destroyed; on the other hand, that consideration would particularly affect the price, and it might be sold on the extent, for a mere trifle, though the tenant should survive for many years. It is proper, therefore, that the strict terms of the act should govern the decision of the court. By the first act that touches the subject, it is provided, generally, "that all lands and houses whatsoever, within this government, shall be liable to sale, upon judgment and execution obtained against the defendant, the owner, his heirs, executors and administrators, where no sufficient personal estate is to be found." But this general authority is restrained by the second act, which declares, "that no such sale shall be made of lands, tenements or hereditaments, which shall or may yield yearly rents or profits beyond all expenses, sufficient within the space of seven years, to pay or satisfy the debts and damages, with costs of suit; but that all those lands &c., shall, by virtue of the execution, be delivered to the party obtaining the same, until the debt or damages be levied, by reasonable extent, in the same manner and method as lands are delivered upon *elegits* in England."

The law of England respecting the writ of *elegit* being thus expressly recognised and adopted, it only remains to show, that an estate for life may be extended by *elegit*; and that is proved from the passage in 4 Black. Com. 418, 419, where it is laid down, that "if the goods are not sufficient, then

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[1] See note to Cooper v. Coats, 1 Dall. 308, and Samuel v. Scott, 7 W. N. C. 438.

the moiety or one-half of the defendant's freehold lands, whether held in his own name, or by any other, in trust for him, are also to be delivered to the plaintiff; to hold until out of the rents and profits thereof, the debt be levied, or until, the defendant's interest be expired: as, until the death of defendant, if he be tenant for life, or in tail." It is to be remarked, besides, that if the tenant for life dies, before the debt is paid, the plaintiff has still a remedy over upon any other property of which he was possessed.

S. Levy, for the plaintiff. The sheriff is authorised to hold an inquest, wherever he takes real estate in execution; but when the estate is of this transient and precarious kind, it cannot be deemed within the intention of the legislature, in making the provision for delivering instead of selling estates, whose rents are capable of paying the debt in seven years. The first act of assembly, *being in derogation of the common law, ought to be strictly construed. It does not direct an inquest to be held; but gives a general authority to levy upon all lands, and of course, a power to sell at once, all the defendant's estate in the premises. The second act does not repeal, but only alters the preceding one, by directing an inquest to be held, where real estate is taken in execution. It does not, however, describe the particular estates on which the inquest shall pass; and the inconveniences of admitting it, in the case of life-estates, are insurmountable.

*77]

After consideration, the President delivered the opinion of the court, to the following effect.

SHIPPEN, President.—The question is, whether an estate for life can be taken in execution and delivered to the plaintiff, upon return of an inquest that the profits are sufficient for paying the debt in seven years? On a fair construction of the act of assembly, we do not think, the legislature intended, that an estate for life should be delivered to the plaintiff, in satisfaction of his debt. The general interest, and of consequence, the septennial value are so precarious, that they could not have been in contemplation, in making a positive provision, that the estate should be delivered, until the plaintiff's debt is paid. Besides, if the legislature had so intended, a provision would, surely, have been added, to supply any deficiency, in case of a failure of the estate, before the discharge of the debt; as, in another case, the same act especially provides, that if the valuation of the land delivered to the plaintiff, towards satisfaction of his debt, shall fall short, he may have another execution against the defendant's body, lands or goods, for the residue.

We are, therefore, of opinion, that an estate for life, taken in execution, may be sold, without holding an inquest on its value; and consequently, that the inquest, in the present case, must be quashed.[1]

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[1] The law on this subject has been altered by the act of 13th October 1840 (P. L. 3), which has provided a complete system for execution against estates for life. For the decisions under this act, and its supplements, see Bright. Dig. 1092–4.

OCTOBER SESSIONS, 1790.

SHARPE *v.* THATCHER.

Certiorari.

It is ground for the reversal of a justice's judgment, on *certiorari*, that it was given merely on the testimony of the party interested.

No justice ought to take cognisance of a cause, which has been previously decided by another magistrate.

THIS was a *certiorari* to remove the judgment given in this case by Justice Wharton. On a motion, made by *Sergeant*, to reverse the judgment, it appeared, that Thatcher, the present defendant, had originally sued Sharpe, the plaintiff, before Justice *Coates, to recover a debt; that Sharpe offered to make a set-off, for water-money, that is, a charge for [*78 Thatcher's drawing water at his pump; but that Justice Coates refused to admit it, and gave judgment for the debt demanded. That, thereupon, Sharpe sued Thatcher before Justice Wharton; and his son was sworn, as a witness, to prove an agreement between the parties, relative to paying water-money, but he declared he knew nothing about it. That Sharpe himself was then qualified to the truth of his account; and upon this evidence alone, Justice Wharton gave judgment for the amount; though it was formally certified to him, that Justice Coates had already decided upon the same question.

THE COURT, in terms of great disapprobation, declared that no justice ought to take cognisance of a cause, which had previously been decided by another justice. But without taking that point into consideration, they said, a judgment given, merely on the attestation of the party interested, could not be sustained.

Judgment reversed.

——— *v.* GALBRAITH, garnishee.

Depositions.

In a *scire facias* against a garnishee in foreign attachment, a rule may be granted to take depositions, before the return-day, on notice to the garnishee.

THIS *scire facias* against the garnishee in a foreign attachment, was returnable to December term next; and on motion of *Howell* and *Hallowell*, the COURT granted a rule for taking the depositions of witnesses, on notice to the garnishee.

BANK OF NORTH AMERICA *v.* VARDON.

Notice of non-payment.

THIS was an action against the indorser of a promissory note; in which the only defence attempted, on the trial, was the want of notice that the note had not been paid by the maker, when it became due. *Lewis*, for the plaintiff, would not admit, that in Pennsylvania, the strict doctrine of notice applied to the case of promissory notes, as in England; where notes are put

by statute upon the same footing with bills of exchange, and must, therefore, in that respect, as well as every other, be regulated by the same rules; nor that a protest on a promissory note was at all necessary here, except for the convenience of ascertaining the demand and non-payment. He produced, however, the messenger of the bank, to prove the fact of notice being *given to the indorser, in the present case, in a short time, and within the customary period, after the maker had made default.

*79]

THE COURT were of opinion, that the notice was sufficiently proved, to have been given within a reasonable time; and that it was, therefore, unnecessary to make any remarks on the law, which had been suggested by the counsel.

Verdict for the plaintiff.

MILTENBERGER v. LLOYD.

Foreign attachment.

In foreign attachment, a rule to show cause of action must be moved for, at the first term.

A FOREIGN attachment issued against the defendant, returnable to the June term 1790, and in the vacation after September term, special bail was entered. At the present adjourned court, *Hallowell* moved for a rule to show cause why the defendant should not be discharged on common bail. But—

SHIPPEN, President.—The obvious hardship of tying up property by foreign attachments, induced us to investigate the cause of action, and to dissolve the attachments, if, under the same circumstances, in the case of a *capias*, common bail would be ordered. This authority must, however, be exercised by the court; and therefore, such cases are always referred thither by a single judge. But even the court will not exercise it, unless the application is made at the first term: and consequently, the present motion is much too late.[1]

DECEMBER SESSIONS, 1790.

MYERS v. YOUNG.

Exoneretur.

Where a defendant has been discharged on common bail, an *exoneretur* will be entered upon a recognisance of special bail, which has been given by the bail to the sheriff, without the defendant's knowledge.

IN this cause, a *capias* had issued, and bail was given to the sheriff; but on a citation to show the cause of action, &c., before Mr. President SHIPPEN,

[1] But see, *contrà*, Penman v. Gardiner, 4 Yeates 6; Morris v. Tanner, 3 Clark 423; Mills v. McFarland, Serg. on Attachments 142.

the defendant was ordered to be discharged on common bail. Before the citation, however, and without the knowledge of the defendant, the bail to the sheriff had entered special bail at the prothonotary's office.

But on motion of *Dallas*, for the defendant, the court directed an *exoneretur* to be entered.

SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1766.

*Stackhouse's Lessee *v.* Stackhouse.

Will.—Parol evidence.

This was an ejectment brought by Isaac Stackhouse, against his brother Joseph Stackhouse, for 215 acres and 74 perches of land, which he claimed, instead of 100 acres, under the following clause in their father's will: "I do give and bequeath unto my son Joseph Stackhouse, his heirs and assigns, a certain piece of land, to be taken off the east end of my plantation, joining to William Paxton's land, to be laid out as followeth; to begin at the said Paxton's land and the fourth line, and to run along as it is laid out westward, until it come at the ditch of the meadow fence, then to follow the said fence, as it now stands, to take in the little meadow and the field; then along the northward line of my land, to William Paxton's land aforesaid; then by the said Paxton's line to the place of beginning; supposed to be about one hundred acres, be it more or less." Isaac was willing to allow his brother Joseph, 171 acres and 90 perches; but Joseph insisted that he was also entitled, agreeable to the designated boundaries of the devise, to include a piece of land, containing 43 acres and 144 perches, that jutted out to the southward of the meadow fence: and he offered parol testimony to explain the meaning of the will.

For admitting the testimony, the following authorities were adduced: 2 Vern. 152, 648, 736, 517, 593; 5 Co. 68; Freeman 292, 477 (The judgments in Freeman were reversed 1 Vent. 341, but for another reason); 9 Mod. 10; 2 P. Wms. 419, 135.

In exclusion of the testimony were cited, 4 Co. 4; Vin., title Devise, 188, 190, 195; Str. 1262; 1 Salk. 234; 2 Vern. 625; 2 Ibid. 98. *Cheyney's Case*, 5 Co. 68; 12 Mod. 183; 2 P. Wms. 318; 10 Mod. 98; 3 P. Wms. 51; Ld. Raym. 438; 3 Ch. Rep. 170, 176, 183; 2 Bac. Abr, 309; 2 Vern. 98, 337; Cas. temp. Talb. 240–1; Brownl. 132; 19 Vent. 195; 2 P. Wms. 419; 2 Eq. Ca. Abr. 426; 2 Barn. 118.

*81] *The note with which the reporter has been favored does not specify, whether the testimony was admitted or rejected; but there was a verdict in favor of Joseph Stackhouse, for the whole of his claim.

MASTERS' Lessee *v.* SHUTE.

Evidence.

An office-copy of a survey, under the hand of the deputy surveyor-general (the office having no seal), is evidence; the original not being in the office.

THE office-copy of a survey, certified by Robert Longshore, as deputy surveyor-general, without seal (no seal being established by law for the surveyor-general's office), was given in evidence: the original not in office.

TAXIER *et al.* *v.* SWEET *et al.*

Jurisdiction.

A court of common law has jurisdiction of an action to recover the value of a vessel taken as prize by the defendant, and ordered to be restored, by the court of appeals in prize cases.

THE plaintiff brought an action of *trover* against the defendants, for a vessel and cargo, returnable to the common pleas, of June term 1769. The declaration recited, that the plaintiffs were possessed of the vessel and cargo, to wit, at Philadelphia county, the 31st of March 1762; that they casually lost them; that the said 31st of March, they came to the possession of the defendants by finding; and that, nevertheless, the defendants, knowing the goods to belong to the plaintiffs, did not deliver them, &c., but afterwards, on the same day and year, converted them to their own use, at Philadelphia county, &c.

The action being removed into this court, was referred, at April term 1771, and the referees reported 2900*l.* to be due to the plaintiffs, subject to the opinion of the court, on the point of law arising from the following facts.

The defendants, Samuel Sweet, commander of a privateer, Abraham Whipple, James Potter and William Davis, commanders of vessels with letters of marque, did forcibly take, on the high seas, near Monte Christi, in the Island of Hispaniola, in the West Indies (where the vessel was lying at anchor), the ship called the Maria Francia, with her cargo, being the property of the plaintiffs, and carried her, with her cargo, into Rhode Island; at which place, she and her cargo were condemned as prize and sold, as appeared by the proceedings of the court of vice-admiralty there. But on an appeal to the court of Lord Commissioners of Appeals, they, by their final decree, reversed the sentence of condemnation, as appeared by a certificate of the proceedings of that tribunal.

The question to be decided, on the preceding state of the case, was—whether an action at common law lies for the plaintiffs *as now brought? And it was twice argued, by *Waln*, for the defendants, and by *Dickinson*, for the plaintiffs. [*82

For the *defendants*.—The courts of common law have a jurisdiction over all matters of dispute, which begin on the land; but where the dispute or cause of action arises at sea, the admiralty has the sole cognisance, and the courts of common law have no right to interfere. Thus, if an action is brought at common law for a taking, it is a good bar, to plead that the taking was on the high seas; and even supposing the conversion was on land,

yet that is coupled with the original taking, and draws the cognisance to the admiralty. It is admitted, that if the plaintiffs were without a remedy expressly given by law, the judges would provide some remedy to redress the injury which has been sustained: but where the law prescribes a particular mode of redress, the judges are not at liberty to invent and allow a new one. The legal appropriate methods of redress, in this case, are either by writ of restitution, founded on the reversal of the sentence of the vice-admiralty of Rhode Island; or by suit upon the stipulations which were taken in that court. No action like the present has ever been instituted; which, according to Littleton, is a good argument that no such action can be maintained.

But waiving, for a moment, the question of jurisdiction, the action of *trover* is not the proper action: it should be a special action on the case setting forth all the particular circumstances of the transaction. For in *trover*, three points are essential to be proved: 1st. The plaintiff's property; 2d. A possession in the defendant; and 3d. A conversion by the defendant to his own use. Now, the plaintiff's property was unquestionably altered; and, in law or fact, they had no property in the vessel or cargo, at the time the writ was issued; both having been sold, as perishable goods, under the sentence of the court of admiralty; and consequently, all the property of the plaintiffs (without which they cannot maintain *trover*) was completely divested. Nor were the vessel and cargo ever converted to the use of the defendants: they seized them in the execution of their duty as officers; they pursued the legal steps to get them condemned; and while the cause was in suit, the property was *in custodia legis*. But even supposing that a forcible taking might be construed into a conversion (which, however, is denied in Bunbury's reports)[1] yet still the action fails; for some of the captains, being at a distance, when the seizure was made, were not parties to the force, nor consequently, to the constructive conversion, and therefore, ought not to have been joined as defendants.

When, it is to be inquired, did the right to bring this action accrue? *83] Did it accrue at the time of the capture? No, because *prize or no prize, is only determinable in the admiralty (Carth. 475. Comb.). Did it accrue after the sentence in the court of admiralty of Rhode Island? No, because by that sentence, it was adjudged that the plaintiffs had no right to the vessel or cargo. Did it accrue after the sentence was reversed? No, because the personal action had been suspended, and must always be so. There is a great distinction between judgments vacated, and reversed by writ of error: if vacated, the case is *in statu quo;* but not, if they are reversed. A reversal on an appeal is similar to a reversal on a writ of error; it does not restore matters to the state in which they were at first; it has no retrospective operation. In this case, then, there was a suspension of action. While the sentence of the admiralty court of Rhode Island was in force, the action would not lie; and consequently, there was an intermediate period between the time of committing the injury complained of, and the present time, when the action was suspended; a suspension which has not and cannot be cured, by any relation to the reversal of the sentence; for a personal action, once suspended, is always so.

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[1] Etriche v. An Officer of the Revenue, Bunb. 67. And see Israel v. Etheridge, Id. 80.

Besides the cases already referred to, the following were cited, in the course of the argument for the defendants: 1 Sid. 320, 367; Carth. 398; 1 Bac. Abr. 625; 2 Saund. 259; Cro. Eliz. 685; 4 Co. 141; Comb. 444; 8 Co. 143; Moor 753; 2 Ld. Raym. 925; 1 Lev. 243, 95; Rast. 303; Hob. 10; Cro. Car. 173; Litt. Arg. 1 Sid. 124; Vaugh. 27; Carth. 32; 2 Litt. Pr. Reg. Vin. Ev. 95; Salk. 188; Cro. Jac. 698; Bunb.

For the *plaintiffs*.—The admiralty has not the sole power of determining any injury whatever, arising on the high sea: its authority is merely derivative, from the sufferance and permission of the court of common law, whose jurisdiction is unbounded, and includes an original right to determine matters arising on the high sea; nor does the allowance made to the admiralty impair that jurisdiction. 3 Bl. Com. 87; Ld. Raym. 272. Thus, though the admiralty is permitted to determine pleas for mariners' wages; yet, if the contract be *under seal*, the cognisance belongs to the courts of common law alone. Salk. 31. And as the question of damages does not relate to maritime affairs, it may surely be as properly and as well determined at common law, as contracts under seal. There are innumerable authorities to show, that the courts of common law maintain a constant control over the courts of civil law jurisdiction. They have obliged an ecclesiastical court to admit the proof of a testament by one witness. Salk. 547. And when the Lord Admiral stated it as a grievance, that the common-law courts encroached on the admiralty jurisdiction, by a fiction supposing the matters to be done on land, the judges in their answers, *take no notice of the fiction, but admit the admiralty jurisdiction of matters arising at sea. [*84 4 Inst. 134–5; Ridley 172; Zouch 129. But the truth is, that all transitory actions are triable anywhere. 4 Inst. 140, 213. If a man cut trees in Ireland, and then goes into England, *trover* lies against him. The action would appear to be local in such a case, yet such is the effect of the law's desire that redress is given everywhere. 9 Mod. 322; Salk. 290; Cro. Car. 242. The adverse counsel, indeed, has not been able to discover anything like a similar plea to the jurisdiction, except in the *Statham case*, 4 Inst. 141; which, however, is not a plea to the jurisdiction; but a plea in bar; a plea in justification of the trespass; and in Godbolt 386, it appears that the *Statham case* was considered as proving, that the courts of common law had jurisdiction of matters arising at sea. In the instance of a Spaniard having taken an English vessel, which was retaken, before the Spaniard got into port, the common law would not concede jurisdiction to the admiralty; and granted a prohibition, because the property might be brought in question. 2 Brownl. 11, 29; Carth. 367. So, in an action of trespass, the defendant pleaded a capture, and condemnation in the admiralty; but the court gave judgment for the plaintiff, because the defendant did not show what was the cause of the capture. Show. 6, 7. Prize or no prize, is not the question: that question has been determined already; and if the courts of common law will pay a regard to the sentence of condemnation in a court of admiralty, when that sentence is reversed, they ought equally to respect the decree of reversal.

But the court can only be desirous to ascertain that the present action is well brought. Detinue and replevin are actions in affirmance of property; but in trespass and trover, on the contrary, the plaintiff waives the property,

and demands nothing more than damages. Sid. 171; Cro. Jac. 50. Trover is never intended to recover the specific article. It lies, therefore, for money, not in a bag, though detinue cannot be brought in such case (Noy 12; Cro. Car. 89; 1 Roll. Abr. 5, pl. 1); and if the nature of the thing is altered, it is evidence of the conversion; but it is not good evidence in detinue, where the demand of the thing is in specie, and where no conversion is alleged. Gilb. L. Ev. 261. There are cases, indeed, in which detinue could afford no adequate remedy; as in the case of drawing out part of the wine out of a pipe, and filling it up with water. 1 Str. 576. A forcible taking is, likewise, evidence of a conversion. Gilb. L. Ev. 264; Cro. Eliz. 824. But while the sentence of condemnation was in force, neither trespass nor trover would lie. Raym. 336.

*85] *It is likewise to be considered, that though a sale under the sentence of a court of admiralty, like a sale in market-overt, alters the property; yet, in both cases, the wrongdoer remains liable, or he would be suffered to take advantage of his own wrong: and even after a sale has been made, if the goods come again into the possession of the original owner, his right of property will revive. 2 Inst. 713. There are, however, many instances of pleading a sale in market-overt, by the innocent purchaser, but not a single instance of such pleading in the case of the wrongdoer.

From the sentence of condemnation, therefore, to the sentence of reversal, it is but one transaction; and the issue of it places the parties *in statu quo*. A court of admiralty is not a court of record; and consequently, a writ of error will not lie upon its decrees: but this does not justify the distinction between judgments vacated and reversed; and the reversal in this case is similar to vacating. See 4 Inst. 340; 8 Co. 135; 5 Id. 76; Salk. 32. That a relation will make a nullity between the parties themselves, but not as to strangers, is a common rule. Ld. Raym. 521. The whole doctrine of relations, indeed, is favorable to the plaintiffs. 18 Vin. 291, 293; Str. 996; 1 Burr. 20. And, correctly speaking, their property has never been in suspension, but *in custodia legis*.

After the argument, the Court were divided in opinion on the question —whether the action of *trover* was proper? Two of the judges deciding in the affirmative, against the other: but they concurred, clearly and unanimously, on the point of jurisdiction; and accordingly, gave

Judgment for the plaintiffs.(*a*)

(*a*) Since the Revolution, however, the nature and extent of the admiralty jurisdiction, has been more strictly investigated and defined, both in the state courts and the courts of the United States. See 1 Dall. 49, 95, 180, 218, and several cases in the sequel of this volume.

APRIL TERM, 1781.

*Respublica v. McCarty.(a) [*86

Treason.—Evidence.

Nothing will excuse the act of joining the public enemy, but the fear of immediate death.
When an *overt* act of treason has been proved by two witnesses, the defendant's confession of another species of treason, is admissible on corroboration.

The defendant was indicted for high treason, in levying war, &c., by joining the armies of the King of Great Britain.

On the trial, the attorney-general offered to give the confession of the party in evidence, made at the time of his arraignment; but *Ingersoll* objected, that a confession could only be admitted to be given in evidence, by way of corroboration, and that, therefore, an *overt* act should be first proved. Fost. 10, 240.

Bradford, Attorney-General, contended, that the confession, proved by two witnesses, was of itself sufficient; but that, independently of that position, it was not necessary to prove the *overt* act, before the admission of the confession; and he referred to 5 Bac. Abr. 152.

By the Court.—No case of this kind has hitherto occurred in this court. In the case of the *Commonwealth* v. *Roberts* (1 Dall. 39), the defendant's confession was offered merely to show *quo animo* he committed the treasonable act; and the court were there of opinion, that it ought to be admitted as corroborative proof. We find, indeed, that in *Berwick's Case*, Fost. 10, two judges thought that a concession *after the fact*, proved by two witnesses, was sufficient to convict, within the 7 *Wm. III.*: but Justice Foster doubted the propriety of that opinion; as the statute seemed to require two witnesses to the *overt* acts, or a confession *in open court.*

The statute of 7 *Wm. III.*, on which that diversity of sentiment arose, does not, however, extend to Pennsylvania; but materially varies from our law on the subject. For instance, the act of parliament requires two witnesses to find the indictment, as well as to prove the *overt* act upon the trial: but the act of assembly prescribes nothing about the evidence to find the indictment; which may, therefore, proceed either from one witness, *or from any other kind of proof that will serve to convince the [*87 grand jury; and although it declares there shall be two witnesses to convict the defendant, on his trial, it does not specify, that they shall be witnesses to an *overt* act, or any other particular matter. Again, the statute of *Wm. III.*, provides for the case of a confession "*willingly, without violence, in open court;*" whereas, the act of assembly uses no such words.

Certain it is, that considered abstractedly, at common law, the confession of the party would be sufficient proof to convict him. But, upon the whole, we decline giving an opinion, at this time, whether, taking into view the act of assembly, the confession proved by two witnesses, can have such con-

(a) This indictment was tried at a session of oyer and terminer, held at Philadelphia, in April 1781. As the judges were the same who presided in the supreme court, it has not been thought necessary in any other way to distinguish the tribunals.

clusive force. We do not hesitate, however, to receive it in corroboration of any other evidence that may be adduced in support of the prosecution.

The evidence and arguments of counsel being concluded, the chief justice delivered the following charge to the jury:

McKean, C. J.—The crime imputed to the defendant by the indictment, is that of levying war, by joining the armies of the King of Great Britain. Enlisting, or procuring any person to be enlisted, in the service of the enemy, is clearly an act of treason. By the defendant's own confession, it appears, that he actually enlisted in a corps belonging to the enemy; but it also appears, that he had previously been taken prisoner by them, and confined at Wilmington. He remained, however, with the British troops for ten or eleven months, during which he might easily have accomplished his escape; and it must be remembered, that, in the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. But had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.

In the present instance, the confession of the defendant was not taken in writing and subscribed: but the statute of 1 & 2 *Philip & Mary*, c. 10, is in force in Pennsylvania; and, as in common cases, it is sufficient for the purposes of evidence, if a man subscribes his examination before a magistrate, so, in the case of a treason, a confession reduced to writing and subscribed before a justice and another witness, would be sufficient ground for a conviction under our act of assembly, or even under the statute of *Wm. III.* At the time of William's landing in England, James still maintained a strong party; of whom some were to be found in the House of Lords, and some in the House of Commons. The statute was, probably, therefore, *88] framed, so as to be *most favorable to those who espoused the cause of the invading monarch; and hence we may derive all the provisions, which, on charge of high treason, make two witnesses necessary to the same *overt* act, or to two different *overt* acts of the same treason, or the confession of the defendant in open court. 5 Bac. Abr. 145. It appears, however, as I have before intimated, that it has been decided that a confession, though not made in open court, if made in the presence of two witnesses, may be read in evidence against the defendant, contrary to the opinion of the Chief Justice Trevor, and the doubts of Justice Tracy. 5 Bac. Abr. 152; Fost. 10, 240. The case in 5 Bac. must have been the case of an examination in writing, as it is said, it might be *read* in evidence: but *Berwick's Case* was a confession at the time of the fact; so that the former had no conclusive influence on the latter authority.

It must, at the same time, be allowed, that most of the authorities on this point, seem to lean against the admission of the party's confession in the presence of two witnesses, as sufficient for conviction, unless it is made at the time of committing the criminal act, or before a magistrate duly authorised. But the case now before us, arises on a confession in open court, and though the whole confession must be considered together; yet the jury

may, unquestionably, on this, as on every other, point of evidence, believe one part, and disregard another.

Verdict, not guilty.

NOVEMBER SESSION, 1781.

RESPUBLICA *v.* WEIDLE. (*a*)

Misprision of treason.

Words, to amount to misprision of treason, must be spoken with a malicious and mischievous intent.

Drunkenness is no excuse for the commission of a crime.

THIS was an indictment for misprision of treason, in the defendant's speaking the following words—"that he had lived six years in London, and nine years in Ireland; and never lived happier in his life, than he had done under the English government; and that the King of England is our King, and *will be yours." The words proved, by the evidence on the trial, to have been spoken, were, that "Weidle said, he had lived six years [89* in England, and nine in Ireland, and that he lived well, and that it was not so as people took it in this country; and he further said, the King would become King, and that the witness thought so too." There was, however, some attempt to show that he was intoxicated at the time of speaking the offensive words.

The indictment was founded on the 4th section of the act of assembly (1 Dall. Laws 728), and charged all the misprisions of treason there enumerated. The words are, "that if any person or persons, within this state, shall attempt to convey intelligence to the enemies of this state, or the United States of America, or by publicly and deliberately speaking or writing against our public defence; or shall maliciously and advisedly endeavor to excite the people to resist the government of this commonwealth, or persuade them to return to a dependence upon the crown of Great Britain; or shall maliciously and advisedly terrify or discourage the people from enlisting into the service of the commonwealth; or shall stir up, excite or raise tumults, disorders or insurrections in the state, or dispose them to favor the enemy; or oppose and endeavor to prevent the measures carrying on in support of the freedom and independence of the said United States; every such person, being thereof legally convicted, by the evidence of two or more credible witnesses, shall be adjudged guilty of misprision of treason, &c."

Bradford, Attorney-General, having closed the testimony for the prosecution, observed, that the act of assembly was couched in general and comprehensive terms; and that the words proved to have been spoken by the defendant were clearly within the sense and meaning of the words laid in the indictment. To show the heinous nature of the offence, he cited Fost. 200, 201; 4 Bl. Com. 117; and he insisted, that drunkenness, in itself, a vice, could not be an excuse for the perpetration of a crime.

(*a*) This cause was tried at a session of oyer and terminer, held at Lancaster, in November 1781. See the note to the preceding case.

Yeates, for the defendant, premised, that the law on which the indictment arose, was new, and could only be justified by the crisis of American affairs at the time of passing it, when it was necessary to seal the lips of the disaffected. The necessity no longer existed; and policy would admit, what legal authorities required, that, as a penal law, it should be strictly construed. The part of the section of the act, to which the evidence applies, is then materially incorrect: for, it is not sense in the present form of wording and pointing; and can only be rendered intelligible, by adding some words, and by omitting the semicolon, and the disjunctive "or." By that correction, it would read thus: "If any person, by publicly and deliberately speaking *or writing against our public defence, shall maliciously and advisedly endeavor to excite the people to resist the government of this commonwealth, &c." The act, indeed, has, in this respect, been thought so harsh by the legislature, that the offence has since been reduced to the class of misdemeanors.

*90]

But it is the essence of the offence, as well upon general principles, as upon the positive language of the act of assembly, that the words should be spoken publicly, deliberately, maliciously and advisedly, with a view to persuade others to resist the government. Words of mere heat and passion will not constitute the crime alleged; they are often uttered, when the heart is properly disposed; and they must be construed according to their natural and common import, independent of the paraphrase of *innuendoes*. It is true, that the words, in the present instance, are exceptionable; but they manifest in themselves no intention, nor is there any proof of an intention, to persuade others to resist the government; they merely express a matter of opinion; and cannot fairly be converted into matter of treason. Comb. 460; 4 Bl. Com. 79.

Bradford, in reply. It is admitted, that the 4th section of the act of assembly is inaccurately and ungrammatically composed; but the clause which has been the subject of comment on the other side, has always been deemed a substantive and independent one. Let that clause, however, be rejected on account of its imperfections, there still remains abundant matter to support the indictment; for the words being proved, are evidence on another clause, that the defendant "maliciously and advisedly endeavored to excite the people to resist the government of this commonwealth, and to persuade them to return to a dependence upon the crown of Great Britain."

Again, it is agreed, that the words should be spoken maliciously and advisedly; but by malice, the law only intends, that the speech be made in an evil and wicked temper of mind; and deliberation is so far essential, that the mere ebullition of a transient passion shall not be rigidly construed into design and criminality.

The court delivered a charge to the following effect:

McKean, Chief Justice.—This indictment charges all the various acts which constitute misprision of treason; and it is the duty of the jury to inquire, whether the evidence supports any one of the charges. It is said, indeed, that the law on which the indictment is founded, is so inaccurately penned, that it cannot be understood, without supplying certain material words; and it is, undoubtedly, true, that although, in a common case, on a mere question of property (as in the case of a will), the rule of construction

is according to the sense of the instrument; yet, a law constituting a crime, must be strictly and literally *interpreted and pursued. The obscure passage in the act of assembly would be rendered perspicuous and [*91 intelligible, without the addition of any words, by expunging the semicolon, and the monosyllable "*or*;" but even that is unnecessary to support the prosecution; since the words spoken tended to excite resistance to the government of this commonwealth, to persuade the audience to return to a dependence upon the crown of Great Britain, and to favor the enemy; which are distinct and substantive charges of misprision of treason.

It is proper to add, that the words must be spoken with a malicious and mischievous intention, in order to render them criminal: a mere loose and idle conversation, without any wickedness of heart, may be indiscreet and reprehensible, but ought not to be construed into misprision of treason. On the other hand, drunkenness is no justification or excuse for committing the offence; to allow it as such, would open a door for the practice of the greatest enormities with impunity.[1]

Verdict, guilty.

SEPTEMBER TERM, 1785.

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*Boyd v. Bopst.(a) [*92

Sale.—Implied warranty.

In every sale of a chattel, there is an implied warranty of title in the vendor.[2]

In the charge to the jury, the Court observed, that the maxim of *caveat emptor* only applied to real estates; as the purchaser had the means of examining the title, within his own power. But the possession of chattels, is a strong inducement to believe, that the possessor is the owner; and the act of selling them, is such an affirmation of property, that, on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller.

(a) This cause was tried at Easton *nisi prius*, on the 10th June 1785, before the Chief Justice and Rush, Justice.

[1] Commonwealth v. Dougherty, 1 Bro. App. xvii.; Commonwealth v. Hart, 2 Brewst. 546. But intoxication, though not an excuse for crime, if it deprive the intellect of the power to think, and weigh the nature of the act, may reduce the crime of murder to the second degree. Jones v. Commonwealth, 75 Penn. St. 403. It will not, however, affect the grade of crime, unless so great as to render the prisoner unable to form a wilful, deliberate and premeditated design to kill, or incapable of judging of the acts and their consequences. Keenan v. Commonwealth, 44 Penn. St. 55. Drunkenness does not necessarily incapacitate from forming a premeditated design to kill; but it may be evidence of passion only, and of want of malice and design. Pennsylvania v. Lewis, Add. 279; Commonwealth v. Hart, 2 Brewst. 546 The doctrine of this case would appear to apply with peculiar force, to the offence of misprision of treason, by words. See also, the cases collected in Bright. Dig. 520.

[2] McCabe v. Morehead, 1 W. & S. 513; Eagan v. Call, 34 Penn. St. 236; Whitaker v. Eastwick, 75 Id. 229.

*Wycoff v. Longhead. (a)

Usury.

If more than legal interest be included in a note, the *payee* can only recover the principal and legal interest.

The *bonâ fide* purchase of a security, at any rate of discount, is not usurious.

This was an action on a promissory note; to which the defendant pleaded the act of assembly against usury; and thereupon, the following points were ruled by the court, in their charge to the jury.

1st. That where more than legal interest was included in any note, bond or specialty, the whole amount could not be sued for and recovered: but the plaintiff was entitled, in such case, to a verdict for the just principal and lawful interest.

2d. That if a man, directly or indirectly, actually receives more than six per cent., he incurs a forfeiture equal to the money &c., lent; but if an action is brought to recover the amount of the loan, a verdict ought not to be given for the defendant, as that would, in effect, be putting the money into his pocket, instead of working a forfeiture to the commonwealth.

3d. That a man may, *bonâ fide*, purchase any security for the payment of money, at the lowest rate he can, without incurring the penalties of usury.

Respublica v. Steele. (b)

Outlawry.

Process of outlawry must state the *township* of the defendant; but it is enough, to show him to have been there.

The addition of "yeoman," is a sufficient one.

The defendant being outlawed for robbery; and afterwards apprehended, was brought up for judgment; but denying that he was the same Robert Steele, who was mentioned in the outlawry, an issue was joined by the attorney-general to try the identity.

Lewis, as counsel for the prisoner, took two exceptions, on the trial: 1st. That it was not proved, that the defendant was an inhabitant of Wright's Town, as stated in the process of outlawry; for though it appeared that he worked there, he contended, that circumstance alone did not establish a residence. 2d. That the addition is false and defective; for he is called "yeoman," which means (contrary to the fact) that he is a freeholder of the value of forty shillings per annum; and the addition does not extend to the town or hamlet, the name, degree or mystery, without which the outlawry is void. 1 Bl. Com. 406; 2 Inst. 668; Johnson's Dictionary, word, "Yeoman;" 2 Hawk. 185, § 102; Id. 186, § 106; Id. 187–8.

Bradford, attorney-general, insisted, that the proof of residence was sufficiently made; and that, by the statute, the description *might *93] either be of the degree or mystery; the latter of which had been chosen in the present case. 2 Hawk. 186; Wood. Inst. 45.

(a) This cause was tried on the 26th September 1785.

(b) Argued and decided the 14th October 1785.

By the Court.—It is necessary to state the township; but if the defendant is proved to have been there, it is enough to satisfy the designation. The first day a man comes into a place, he is a stranger; the second day, he is considered as a guest; and the third day he becomes an inhabitant. But if any one comes from New Jersey, and stays only an hour in Pennsylvania, during which he commits an offence, he must be charged as of the township in which he was at the time; for he cannot be called of New Jersey.

With respect to the objection against the form of the addition, it is to be observed, that the statute requires the description of a state, degree or mystery; but either of them is sufficient. For instance, it has never been doubted, but that the addition of widow or spinster, is valid, and yet such addition is certainly not descriptive of any degree or mystery.

The issue being found for the commonwealth, sentence of death was pronounced, and the defendant was soon afterwards executed.

MAY SESSIONS, 1786.

Andrew's Lessee *v.* Fleming. (*a*)

Evidence.

In ejectment, the admissions of a party under whom the defendant holds the possession, are evidence for the plaintiff.

The plaintiff may, accordingly, give evidence of a conversation between the defendant's husband (under whom she holds possession) and the persons under whom the plaintiff claims, admitting the title to be in the latter, by virtue of a sheriff's sale.

Ejectment. In the course of the trial of this cause, the following points were ruled.

I. The plaintiff offered to give evidence of a conversation between Thomas Fleming, the husband of the defendant, under whom she held possession, and Callander, under whom the plaintiff claimed; in which Fleming declared, "that he had title to the land in question, taken in execution as his, by the sheriff; and prayed Callander to permit him to continue some time longer in possession."

It was objected, that the admission of the evidence would be setting up a person's own declarations, to give him a title to the land. But—

*By the Court.—Ejectments are possessory actions; and in England, it is necessary to show a possession within twenty years. [*94 The plaintiff may, therefore, show the possession of Mr. Callander, or of any other person under whom he claims, within that term; and in order to do so, he certainly is at liberty to give proof, that the person under whom the defendant claims, was, in fact, nothing more than Mr. Callander's tenant on sufferance. Let the evidence be admitted.

II. It was objected, on the part of the defendant, that the *fi. fa.* by

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(*a*) Ruled at Lancaster *nisi prius.*

virtue of which the lands in question had been sold, only directed the sheriff to levy of *the goods and chattels*, &c., which is not an authority to take the *lands* in execution.

By the Court.—Lands are to be considered as chattels, in Pennsylvania, for the payment of debts. In some counties of this state, and throughout the state of Delaware, the writs of *fi. fa.* always issue in that form. It is said, that the precedents mention "lands and tenements;" but this has not been proved, as it ought to be, by producing in court such precedents, before, at the time, and subsequent to, the issuing of the writ. At most, however, it is but an omission, in point of form; which is too slender a foundation for oversetting a sheriff's sale of lands.

Wilson, for the plaintiff. *Yeates* and *Smith*, for the defendant.

Pennington *v.* Scott.(*a*)

Continuance.

It is only necessary for the party to show due diligence, to entitle him to a continuance: what is such diligence.

This cause being marked for trial, the defendant moved to postpone it, upon an affidavit, stating, "that he took out a *subpœna*, three weeks ago, as soon as the time for holding the court was known, and immediately employed one Rabb to serve it on the witness, who lived at a distance; that he had likewise sent, by the messenger, a letter to his brother, requesting him to see that the *subpœna* was served, and the witness expedited, in case of any accident to Rabb; that the witness was material, without whose testimony, the defendant could not safely go to trial; that Rabb had not returned, nor had the defendant heard anything of him, since his departure; and that he thinks it probable, that the attendance of the witness might be procured at the next court."

Yeates insisted. that the defendant must produce a *subpœna*, and prove the service of it, in order to bring his case within the general rule. But—

By the Court.—It appears, that as soon as the defendant had notice of the time of trial, he took out a *subpœna* for *a witness, at a great distance, in Washington county; but that neither the witness, nor the person employed to serve the *subpœna*, attends. This would not, in strictness, be a sufficient ground for putting off the cause: but it must be remembered, that the defendant, once before, at a considerable expense, brought the same witness to court; and when the cause was continued, without any fault imputable to him, he took the witness's deposition. Having thus, on a former, as well as on the present, occasion, pursued every preparatory step which the law requires, to procure the attendance of the witness, we think, it would be unreasonable, to take advantage of any accident that may have happened to the messenger.

*95]

(*a*) Ruled at Lancaster *nisi prius*.

GALBRAITH'S Lessee *v.* SCOTT. (*a*)

Competency of witness.

Proof of a very remote interest, depending on a contingency, will not disqualify a witness.

IN this cause, it appeared, that a devise had been made of certain premises to A., provided, if he aliens it to any other person than his brother's children, he should pay one-fourth part of the purchase-money to the testator's residuary legatee. The present ejectment was depending between the devisee and one claiming paramount to the devise, and the residuary legatee was offered as a witness on behalf of the plaintiff.

It was contended, by *Bradford* and *Chambers*, for the defendant, that the witness ought not to be admitted: and they cited 2 Cun. Law Dict. 3 Burr. 1856; 11 Mod. 225; 2 Wils. 332; 1 Str. 507; Bull. N. P. 279; 1 Str. 575.

On the contrary, *Wilson* and *Yeates*, maintained the competency of the witness. Cro. Jac. 460; Hob. 170; Moore 881; 1 Salk. 283; Bull. 279, 286; Theory of Evid. 225.

BY THE COURT.—The interest of the residuary legatee is, in this case, so very remote, that we cannot presume it will have any bias upon his mind. He must, therefore, be admitted as a competent witness; leaving his credibility to the jury.

CECIL'S Lessee *v.* LEBENSTONE. (*b*)

Notice of trial.

When the cause is not on the general trial list, the defendant must have actual notice of trial.

THE defendant was tenant for years of the premises for which the ejectment was brought, and one Courtney claimed the fee. The cause was not included in the general *distringas* which had issued for trials, at this court of *nisi prius;* but a special *distringas* afterwards came up for it. Neither the defendant, nor Courtney, however, had received express or implied *notice of trial, from the sheriff, or any other person: And therefore, a motion to bring it on was refused. [*96

BY THE COURT.—The defendant has not received such notice of trial, as made it reasonable for him to prepare. No *laches* can be imputed to him; for he is not obliged to attend at every court, whether his cause is marked for trial, or not. In England, the proof of actual notice is required: but with us, as the gentlemen of the law are not so numerous, as they live dispersed, and as there are no regular posts, the rigor of that rule is not imposed. Still, however, a reasonable notice of trial must be given to the party, not merely to his attorney; and after all, the rules for bringing on causes most be influenced by a legal discretion, applicable to the peculiar circumstances of every case.

(*a*) Ruled at Lancaster *nisi prius.*
(*b*) Ruled at *nisi prius.*

Lesher's Lessee v. Levan.

Proof of deed.

The testimony of a subscribing witness, that he was called on to sign as a witness, is sufficient to go to the jury; they may infer therefrom, a sealing and delivery.[1]

In this cause, articles of agreement, for the sale of a house and lot in Germantown, were offered in evidence as a deed, under the following circumstances. The articles purported to be for the sale of a house and five acres of land, for the consideration of 1200*l.*, payable, 700*l.* in cash, and remainder in bonds. Daniel Longsdorff, who was produced as the witness to the execution of the articles, stated that he was called into a room by Stawaker (the contractor to sell), to witness the execution of the bonds; that when he came in, the papers were lying on a table before Lesher (the contractor to purchase), and Lesher desired him to sign as a witness: that he did not actually see Stawaker sign, seal, or deliver the papers, which he supposed to have been regularly executed, before he was called in; but that he saw the money paid, and he knew the handwriting to be Stawaker's: and that possession of the premises was afterwards, in pursuance of the agreement, delivered to one Harb, of whom Stawaker rented a room in the house in question, for 8*l.*

The counsel for the defendant opposed the admission of the articles of agreement, contending, that there was no proof of the sealing and delivery, which are essential to a deed. But—

By the Court.—There is sufficient proof that the instrument was signed by Stawaker; and therefore, we shall let it go to the jury; who will determine for themselves, whether that, and the other circumstances in the case, are satisfactory evidence of sealing and delivery.

Rush, Justice. (*Dissenting.*)—I differ in opinion from the rest of the court. I think, that before the instrument is read, sealing and delivery should be proved. If, indeed, the witnesses were *proved to be dead, *97] or absent beyond the reach of the process of the court, the proof of their handwriting would be admitted; or, if that was not practicable, proof of the handwriting of the obligor might be satisfactory. But these circumstances do not occur on the present occasion; and as far as the testimony of Longsdorff goes, it is calculated to induce a belief that there was, in fact, no sealing and delivery of the instrument. It is not, therefore, proved as a deed; and in my opinion, it ought not to be left to the jury as a memorandum.

A bill of exceptions was taken to the opinion of the court, but never prosecuted.

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[1] Long v. Ramsay, 1 S. & R. 72; Miller v. Binder, 28 Penn. St. 489.

APRIL TERM, 1787.

COCKSHOT'S Lessee *v.* HOPKINS.

Amendment.

A declaration in ejectment may be amended, by enlarging the term.

EJECTMENT. The demise laid in the declaration having expired, during the pendency of the action, *Coulthurst*, moved for leave to amend, by inserting the word *twenty*, instead of *seven*, so as to enlarge the term: and he cited Cowp. 841; 4 Burr. 2448.

Lewis was about to reply, when the CHIEF JUSTICE observed, that the point was not only decided by the English authorities, but by a recent adjudication in this court.

BY THE COURT.—Let the amendment be allowed on payment of costs.

PRINGLE *v.* BLACK'S Executors.

Foreign attachment.

A foreign attachment does not lie against an executor.

FOREIGN ATTACHMENT. A rule was obtained to show cause why the foreign attachment should not be quashed: and the only question discussed on the argument was, whether a foreign attachment would lie against an executor?

*After hearing counsel on both sides, and taking time to advise upon the subject, the COURT were of opinion, that the foreign attachment ought to be quashed; and, accordingly, made [*98

The rule absolute.(*a*)

MAY SESSIONS, 1788.

MCCURDY *v.* POTTS *et al.* (*b*)

Trespass.

Possession under an equitable title is sufficient to maintain trespass.

THIS was an action of trespass *vi et armis*, for cutting the plaintiff's trees; to which the defendant pleaded *non cul.*, with leave to justify, &c. The title to the premises was the subject of controversy; and the Chief Justice delivered the following charge to the jury.

(*a*) This minute was furnished by Mr. *Coulthurst*, one of the plaintiff's counsel; and though I cannot state at large the argument at the bar, nor the reasons of the judgment, the point appeared to deserve notice, even in this imperfect form. The authorities cited for the plaintiff were 2 Str. 877; 3 Atk. 409; 2 Ves. 489; Priv. Lond. 256, 268, 263 4, 6; 1 Ld. Raym. 56.

(*b*) Decided at Carlisle *nisi prius*.

McKean, Chief Justice.—It is essential to private justice, and to public peace and order, that the rules of property, as well as of the other objects of society, should be settled and promulged. Wretched, indeed, is the condition of that people, where the law is either uncertain or unknown.

In the present cause, it appears, that, in the year 1767, Hugh McCurdy, the plaintiff, having obtained a location for 200 acres, desired that a survey might be made by the proper officer; who, accordingly, surveyed the tract in question, amounting to 157 acres. On this tract, the plaintiff actually entered, and enjoyed, for a length of time, a peaceable possession. He also improved it, by first erecting a cabin, then a house; and afterwards a barn; and by clearing and cultivating two acres of meadow, forty acres of arable land, and an orchard with 40 or 50 apple trees in it. The proof of these facts is certainly sufficient to maintain an action of trespass; for the *99] plaintiff had *not only an actual, but a legal possession;[1] and on payment of the purchase money to the former proprietaries, his legal title to the premises would have been perfected.

For the defendant, however, it is stated, that he discovered the tract, of which the plaintiff's survey is a part, in the year 1755; that at several times, he erected a cabin, a mill, and a lime-kiln upon it; that he cleared some of the land, and that he made a consentible line with a neighbor. But these circumstances the court declare, will not constitute a legal title. Even in a state of nature, they would confer no right to the 157 acres, within the plaintiff's survey; for, on any part of those acres, it is not pretended that the defendant has ever exercised any act of industry, or that he has even maintained a *pedis possessio.* He made no inclosure, he cut no timber; nor, in short, in any form, appropriated or set apart the premises in question, from the common mass of the circumjacent land. To assert, therefore, that he has acquired an exclusive title, is not less extravagant, than to suppose, that a whole river becomes the property of him who takes a pitcher of water out of it; or that no other man is afterwards entitled to use any part of the water, which may happen again to fall from the pitcher into the stream. For, let me ask, what is the definition of an improvement? Has it no quality or form? And is the quantity of land attached to it circumscribed by no limits? To these inquiries, I have been unable to obtain a satisfactory answer.

The owners of the soil of Pennsylvania were, originally, the proprietaries; and under their authority, agents were appointed to make sales and grants of particular tracts. If two or three persons claimed the same land, the agent had, in strictness, a power to grant it to which of the claimants he pleased; but if one of them had seated himself on the land, and by his own labor and money had improved its value, the proprietaries and their agent always felt an equitable obligation to make the grant in favor of such possessor. If, however, the proprietaries, who are the owners of it, should not choose to do so, the court cannot interfere to control or regulate the exercise of their undoubted territorial right. An attempt of that kind would shake the very foundations of property; and render a verdict or judgment, not a solemn determination on evidence and law, but an instrument of favor to

[1] See Sims v. Irvine, 3 Dall. 448, where it is argued by counsel, that the learned judge inadvertently used the words "*legal* possession," for *lawful* possession."

the party, for whom the court or jury should entertain a predilection. But we must remember, that we are bound by an oath, to administer justice according to the laws, without partiality or prejudice.

Verdict for the plaintiff.

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*McKimm *et al.*, executors, *v.* Riddle. (*a*) [*100

Actions by executors.

Under the general issue, it is not necessary to produce the plaintiff's letters testamentary.

Assumpsit for goods sold and delivered. Pleas, *non assumpsit*, payment, &c.

The plaintiffs, having proved the contract, were called on to produce their letters testamentary; but the counsel insisted, that although they had them, they were not bound to produce them on the present issue.

By the Court.—It is not necessary, under the pleas in this cause, to produce the letters testamentary. If the defendant wished to have them produced, he should have pleaded, and put the matter in issue.

SEPTEMBER TERM, 1788.

Donaldson *v.* Chambers.

Insolvency.

Our courts give effect to a discharge under the insolvent law of another state, which acts upon the contract, as to debts contracted in that state, with a citizen of this state.
Millar *v.* Hall, 1 Dall. 229, re-affirmed.

The defendant was duly discharged under the general insolvent law of Maryland; but coming into Pennsylvania, was arrested in York county, at the suit of the plaintiff. The cause being brought into this court, *Kittera* moved, that he should be discharged on common bail, upon the authority of *Millar* v. *Hall*, 1 Dall. 229: and a rule *nisi* was accordingly granted.

Watts *v.* Willing.

Election.—Discharge of surety.

Certain bills of exchange were delivered to the creditor, to be credited as part payment of a bond when paid; they were protested for non-payment, and the holder rendered an account, charging twenty per cent. damages thereon: *Held*, that he had elected to retain them; and that a surety was discharged *pro tanto*.

This was an action upon a bond, in which the defendant had joined as a surety for Mark Bird. Some time after the bond was given, Bird delivered to the plaintiff certain bills of exchange; which, as appeared by an indorse-

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(*a*) Ruled at Carlisle *nisi prius*.

ment on the bond, were to be credited in part payment, *when paid.*(a) *101] *For several years, no suit was instituted on the bond, and the circumstances of Bird became greatly embarrassed. The bills had been duly protested for non-payment; and the plaintiff (who had never returned them, nor even, at the trial did he offer to return them) furnished accounts, in which he charged twenty per cent. damages. The question, therefore, was, whether the bills were, under these circumstances, to be considered as a payment of so much of the bond? And in the charge to the jury, it was ruled—

By the Court.—That originally the plaintiff had his election to consider himself either as an agent, or as a purchaser, with respect to the bills of exchange; but that the two circumstances of retaining them in his own hands, and of charging twenty per cent. damages, were sufficient evidence to show an election to receive them in payment; and that, therefore, for the amount of the bills, the defendant was entitled to be credited, in an action on the bond.

Verdict accordingly.

Respublica *v.* St. Clair.

Service of subpœna.

The defendant had been outlawed for robbery; and being afterwards apprehended, the present issue was joined on the identity of the person. *Bradford*, Attorney-General, prayed the assistance of the court in sending a *subpœna* for witnesses into Bucks county, as he could not employ the sheriff on a service out of his jurisdiction. The application was for a special messenger; the attorney-general observing, that if, as in England, the judges were attended by tipstaves, those would be the proper officers to employ on the occasion.

But the Court recommended, that he should consult with the sheriff, on a proper person to be hired for the special service.

Respublica *v.* Mitchell.

Interest.

In the settlement of a public account, the commonwealth is liable for interest on the balance.

This was an appeal from the settlement of Mitchell's account by the Comptroller-General; and the cause had been referred, by consent. The referees reported a sum due to Mitchell; but had omitted to allow him interest; which, being stated to the court—

It was resolved, That the state was liable to pay interest, as well as individuals; and that the court would add it, under the circumstances of the case, although the referees had not expressly given it in their report.

(a) Chapman v. Steinmetz, 1 Dall. 261.

*APRIL TERM, 1789.

HOARE *v.* ALLEN and *terre tenants.*

Interest.

Interest does not run, during a state of public war, between citizens of the contending powers.[1]

THIS was a *scire facias* on a mortgage, given on the 4th December 1773, for securing the payment of 16,000*l.* sterling, with interest. It was tried at Chester *nisi prius*, on the 4th May 1789, before the CHIEF JUSTICE, and ATLEE and BRYAN, Justices; when it appeared, that the plaintiff was a British subject, resident in London; that Amos Strettle was his attorney in fact, at the time of the execution of the mortgage, and after: but it did not appear, whether he continued to act as such subsequently to the war. He resided in the state until his death, which was about ———. The question that was made in this cause, was, whether interest should run during the war?

The *defendant* contended, that when two independent nations are at war, the debt is suspended, and no interest can be demanded. That all intercourse was at an end, and a remittance could not be made. All trading with enemies is illegal. Park Ins. 270–1; 2 Valin 31–2; Magens 257. If not so at common law, the resolutions of congress made it criminal. That a statute may repeal a covenant to do a thing that is lawful before: and a war is equivalent to an act of parliament in this case. That where the law prevented the payment of the principal, it never required payment of interest, as in the case of a garnishee. That whether the contract be express and in writing, or merely by parol, the construction must be the same: for equity will imply the exception, though not expressed. Thus in *Pollard* v. *Shaffer*, 2 Dall. 210, the war excused the non-performance of an express contract. So, in the case of the way-going crop. Dougl. 190. So, in case of a division of a risk in a policy. 3 Burr. 1240. They finally urged, that this point had been determined in the case of *Osborne* v. *Mifflin*, which was the case of a bond; and there the court determined, that no interest should be paid during the war.

The *plaintiff* urged, that though debts might be suspended during the war, yet they revived on the peace, and were not extinguished. That, although the court determined the case of *Osborne* v. *Mifflin;* yet they distinguished that case from the present, by urging that that case went on the principle of the *plaintiff's being in England, and having no attorney here: and that while he had an agent here, which was until 1778, the [*103 interest ran, and only 3½ years' interest was stricken off from the plaintiff's demand.(*a*) That in the present case, Strettle was the attorney: that a

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(*a*) BY THE COURT.—There was no proof before the court, that he was an alien enemy: he had lived here many years, and went to England before the war.

[1] See Crawford *v.* Willing, 4 Dall. 286; Conn *v.* Penn, Pet. C. C. 496, 524; Bainbridge *v.* Wilcocks, Bald. 536; Brown *v.* Hiatt, 15 Wall. 177; Shortridge *v.* Macon, 1 Abb. U. S. 58; Chappelle *v.* Olney, 1 Sawyer 401; Bigler *v.* Waller, 4 Bank. Reg. 86; Jackson Ins. Co. *v.* Stewart, 15 Am. L. Reg. 732.

tender or payment to him would have been good; and that such payment did not in any manner contravene the resolution of congress. That payment in bills of exchange would be lawful, at any time, and could not in any manner aid the arms of the enemy. That this case was different from that of a bond: for the very land mortgaged was the consideration of the debt; and the defendants were actually in the enjoyment of the profits of the land, during the whole war.

The *defendant*, in reply, contended, that the war was a revocation of Strettle's authority; and that which another cannot do by himself, he cannot do by attorney: that even his power to sue, during the war, was gone.

By the Court.—This action is brought on a mortgage for 16,000*l.*, payable on 4th December 1774. No suit could be brought on the mortgage, before the 4th December 1775. Before that period, the war commenced, and on the 10th September 1775, the congress prohibited the exportation of commodities, &c., to Great Britain, or any of her dominions. This was obligatory on their constituents, and it became unlawful to make any remittances, after this, to the enemy. During a war, all civil actions between enemies are suspended; debts are suspended also, but restored by the peace. For the term of 7½ years, viz., from the 10th September 1775, to the 10th March 1783, the defendant could not have paid this money to the plaintiff, who was an alien enemy, without a violation of the positive laws of this country, and of the laws of nations. They ought not, therefore, to suffer for their moral conduct, and their submission to the laws.

Interest is paid for the *use* or *forbearance* of money. But in the case before us, there could be no forbearance; because the plaintiff could not enforce the payment of the principal; nor could the defendants pay him, consistent with law; nor could they pay it, without going into the enemy's country, where the plaintiff was. Where a person is prevented, by law, from paying the principal, he shall not be compelled to pay interest, during the prohibition, as in the case of a garnishee in a foreign attachment.

It is urged, that a remittance in bills of exchange furnished the enemy with no money. Yet, it is clear, that it would furnish the enemy with the means of carrying on the war, within the *bowels of the country, without bringing any money into it. It is well known, that the bills drawn by the British army were the principal bills that were bought and sold; those drawn by American citizens were generally protested.

*104]

It has been said, that it might have been paid to Strettle: but that depended upon his pleasure, whether he chose to act as attorney or not.

I have searched for precedents, both in the civil law, and in the books of reports; but could find none. We, therefore, determine on principle and analogy, and are unanimously of opinion, that the plaintiff is not entitled to interest from the 10th September 1775 to 10th March 1783; but during the rest of the time, he must be allowed full interest.

The jury adopted the principles of the charge; but struck off 8½ years interest.(*a*)

(*a*) Since the decision of this case, the abatement of interest, during the war, in all actions for the recovery of British debts, antecedently due, has been the uniform prac-

tice in the courts of Pennsylvania; but it has been alleged, that in one of the circuit courts a different rule has been adjudged. Foxcraft *v.* Nagle, *post*, p. 132, 150. It appears, however, that Mr. Jefferson, when secretary of state, ably maintained, on behalf of the federal government, a doctrine similar to that expressed by the court, in the above report; agreeable to the subjoined extract from his celebrated reply to Mr. Hammond, the British minister plenipotentiary.

"The reasons on which the denial of interest is grounded, shall be stated summarily, yet sufficiently to justify the integrity of the judge, and even to induce a presumption, that they might be extended to that of his science also, were that material to the present object.

"§ 54. The treaty is the text of the law in the present case, and its words are, that there shall be no lawful impediment to the recovery of *bonâ fide* debts. Nothing is said of interest on those debts; and the sole question is, whether, where a debt is given, interest thereon flows from the general principles of the law? Interest is not a part of the debt, but something added to the debt, by way of damage for the detention of it. This is the definition of the English lawyers themselves, who say, 'Interest is recovered by way of damages—*ratione detentionis debiti.*' 2 Salk. 622, 623. Formerly, all interest was considered as unlawful, in every country of Europe: it is still so in Roman Catholic countries, and countries little commercial. From this, as a general rule, a few special cases are excepted. In France particularly, the exceptions are those of minors, marriage portions, and money, the price of lands. So thoroughly do their laws condemn the allowance of interest, that a party who has paid it voluntarily may recover it back again, whenever he pleases. Yet this has never been taken up as a gross and flagrant denial of justice, authorising national complaint against those governments. In England, also, all interest was against law, until the Stat. 37 Henry VIII., c. 9; the growing spirit of commerce, no longer restrained by the principles of the Roman church, then first began to tolerate it. The same causes produced the same effect in Holland, and, perhaps, in some other commercial and Catholic countries. But even in England, the allowance of interest is not given by express law, but rests on the discretion of judges and juries, as the arbiters of damages. Sometimes, the judge has enlarged the interest to twenty per cent. per annum (1 Chan. Rep. 57). In other cases, he fixes it habitually one per cent. lower than the legal rate (2 Atk. 343), and in a multitude of cases, he refuses it altogether. As, for instance, no interest is allowed—

1. On arrears of rents, profits or annuities. 1 Chan. Rep. 184; 2 P. Wms. 168; Ca. temp. Talbot 2.
2. For maintenance. Vin. Abr., Interest, C. 10.
3. For moneys advanced by executors. 2 Abr. Eq. 531, 15.
4. For goods sold and delivered. 3 Wils. 206.
5. On book-debts, open accounts, or simple contracts. 3 Chan. Rep. 64; Freem. Ch. 133; Dougl. 376.
6. For money lent without a note. 2 Str. 910.
7. On an inland bill of exchange, if no protest is taken. 2 Str. 910.
8. On a bond, after twenty years, 2 Vern. 458, or after a tender.
9. On a decree, in certain cases. Freem. Ch. 181.
10. On judgments, in certain cases, as battery and slander. Freem. Ch. 37.
11. On any decrees or judgments in certain courts, as the exchequer chamber. Doug. 753.
12. On costs 2 Abr. Eq. 530–7.

"And we may add, once for all, that there is no instrument or title to debt so formal and sacred, as to give a right to interest on it, under all possible circumstances. The words of Lord Mansfield, in Doug. 753, where he says, 'That the question was what was to be the rule for assessing the damage, and that, in this case, the interest ought to be the measure of the damage, the action being for a debt, but in a case of another sort the rule might be different;' his words in Doug. 376, 'That interest might be payable in cases of delay; if a jury, in their discretion, shall think fit to allow it.' And the doctrine of Giles *v.* Hart, 2 Salk. 622, that damages, or interest, are but an

accessory to the debt, which may be barred by circumstances which do not touch the debt itself—suffice to prove that interest is not a part of the debt, neither comprehended in the thing, nor in the term; that words, which pass the debt, do not give interest, necessarily, that the interest depends altogether on the discretion of the judges and jurors, who will govern themselves by all existing circumstances; will take the legal interest for the measure of their damages, or more, or less, as they think right; or will give it from the date of the contract, or from a year after, or deny it altogether, according as the fault, or the sufferings, of the one or the other party shall dictate. Our laws are generally an adoption of yours; and I do not know that any of the states have changed them in this particular. But there is one rule of your and our law, which, while it proves that every title of debt is liable to a disallowance of interest under special circumstances, is so applicable to our case, that I shall cite it as a text and apply it to the circumstances of our case. It is laid down in Vin. Abr., Interest, C. 7, and 2 Abr. Eq. 529, and elsewhere, in these words, 'Where, by a general and national calamity, nothing is made out of lands which are assigned for payment of interest, it ought not to run on during the time of such calamity.' This is exactly the case in question. Can a more general national calamity be conceived, than that universal devastation, which took place in many of these states during the war? Was it ever more exactly the case anywhere, that nothing was made out of the lands which were to pay the interest? The produce of those lands, for want of the opportunity of exporting it safely, was down to almost nothing in real money; *e. g.*, tobacco was less than a dollar the hundred weight: imported articles of clothing or consumption were from four to eight times their usual price: a bushel of salt was usually sold for 100 lbs. of tobacco. At the same time, these lands, and other property, in which the money of the British creditors was invested, were paying high taxes for their own protection, and the debtor, as nominal holder, stood ultimate insurer of their value to the creditor; who was the real proprietor, because they were bought with his money. And who will estimate the value of this insurance, or say what would have been the forfeit, in a contrary event of the war? Who will say, that the risk of the property was not worth the interest of its price? General calamity, then, prevented profit, and consequently, stopped interest, which is in lieu of profit. The creditor says, indeed, he has laid out of his money; he has, therefore, lost the use of it. The debtor replies, that if the creditor has lost, he has not gained it: that this may be a question between two parties, both of whom have lost. In that case, the courts will not double the loss of the one, to save all loss from the other. That it is a rule of natural as well as municipal law, that in questions *de damno evitando melior est conditio possidentis.* If this maxim be just, where each party is equally innocent, how much more so, where the loss has been produced by the act of the creditor. For a nation, as a society, forms a moral person, and every member of it is personally responsible for his society. It was the act of the lender, or of his nation, which annihilated the profits of the money lent; he cannot then demand profits, which he either prevented from coming into existence, or burnt or otherwise destroyed, after they were produced. If, then, there be no instrument or title of debt, so formal and sacred, as to give a right to interest, under all possible circumstances, and if circumstances of exemption, stronger than in the present case, cannot possibly be found, then no instrument or title of debt, however formal or sacred, can give right to interest under the circumstances of our case. Let us present the question in another point of view. Your own law forbade the payment of interest, when it forbade the receipt of American produce into Great Britain, and made that produce fair prize, on its way from the debtor to the creditor, or to any other for his use and reimbursement. All personal access between creditor and debtor was made illegal, and the debtor who endeavored to make a remitment of his debt, or interest, must have done it three times, to assure its getting once to hand: for two out of three vessels were generally taken by the creditor nation, and sometimes by the creditor himself, as many of them turned their trading vessels into privateers. Where no place has been agreed on for the payment of a debt, the laws of England oblige the debtor to seek his creditor wheresoever he is to be found within the realm, Co. Litt. 210 *b;* but do not bind

him to go out of the realm in search of him. This is our law too. The first act, generally, of the creditors and their agents here, was to withdraw from the United States with their books and papers. The creditor thus withdrawing from his debtor, so as to render payment impossible, either of the principal or interest, makes it like the common case of a tender and refusal of money, after which, interest stops, both by your laws and ours. We see too, from the letter of Mr. Adams, June 16, 1786, that the British secretary for foreign affairs was sensible, that a British statute having rendered criminal all intercourse between the debtor and creditor, had placed the article of interest on a different footing from the principal. And the letter of our plenipotentiaries to Mr. Hartley, the British plenipotentiary for forming the definitive treaty, shows that the omission to express interest in the treaty was not merely an oversight of the parties; that its allowance was considered by our plenipotentiaries as a thing not to be inserted in the treaty; was declared against by congress, and that declaration communicated to Mr. Hartley. After such an explanation, the omission is a proof of acquiescence, and an intention not to claim it. It appears, then, that the debt, and interest on that debt, are separate things in every country, and under separate rules. That in every country, a debt is recoverable, while in most countries, interest is refused in all cases; in others, given or refused, diminished or augmented, at the discretion of the judge; nowhere given in all cases indiscriminately, and consequently, nowhere so incorporated with the debt, as to pass with that, *ex vi termini*, or otherwise to be considered as a determinate and vested thing.

"While the taking interest on money has thus been considered in some countries as morally wrong in all cases, in others, made legally right but in particular cases, the taking profits from lands, or rents in lieu of profits, has been allowed everywhere, and at all times, both in morality and law. Hence it is laid down as a general rule, Wolf. § 229, '*Si quis fundum alienum possidet, domini est quantum valet usus fundi, et possessoris quantum valet ejus cultura et cura.*' But even in the case of lands, restored by a treaty, the arrears of profits or rents are never restored, unless they be particularly stipulated. '*Si res vi pacis restituendæ, restituendi quoque sunt fructus a die concessionis,*' says Wolf. § 1224. And Grotius, '*cui pace res conceditur, ei et fructus conceduntur a tempore concessionis, non retro.*' Lib. 3, c. 20, § 22. To place the right to interest on money on a level with the right to profits on land, is placing it more advantageously than has been hitherto authorised; and if, as we have seen, a stipulation to restore lands does not include a stipulation to restore the back profits, we may certainly conclude *à fortiori*, that the restitution of debts does not include an allowance of back interest on them.

"These reasons, and others like these, have probably operated on the different courts to produce decisions, that 'no interest should run during the time this general and national calamity lasted.' And they seem sufficient, at least, to rescue their decisions from that flagrant denial of right, which can alone authorise one nation to come forward with complaints against the judiciary proceedings of another.

"The states have been uniform in the allowance of interest, before and since the war, but not of that claimed during the war. Thus we know by the case of Neate's executors *v.* Sands, in New York, and Middred *v.* Dorsey, in Maryland, that in those states, interest during the war is disallowed by the courts. But the act relating to debts due to persons who have been and remained within the enemy's power, or lines, during the late war (passed May 1784), that Connecticut left it to their court of chancery to determine the matter, according to the rules of equity, or to leave it to referees. By the case of Osborne *v.* Mifflin's executors, and Hoare *v.* Allen, explained in the letter of Mr. Rawle, attorney of the United States; and by the letter of Mr. Lewis, Judge of the district court of the United States, that in Pennsylvania the rule is, that where neither the creditor, nor any agent, was within the state, no interest was allowed; where either remained, they gave interest. In all the other states, I believe, it is left discretionary in the courts and juries. In Massachusetts, the practice has varied. In November 1784, they instruct their delegates in congress to ask the determination of congress, whether they understood the word 'debts' in the treaty as including interest?

JUNE TERM, 1790.

*TODD v. THOMPSON.

Practice.

A rule for trial or *non-pros.* was granted, where the plaintiff had been guilty of negligence in obtaining documentary evidence.

THIS cause being marked for trial, it was continued by the plaintiff; whereupon, the defendant's counsel moved for a rule to try at the next term, *106] or *non-pros.* This, however, *was opposed, the plaintiff's counsel alleging, that there was no default on his part, as the procrastination arose, in fact, from the absence of a material witness, and the late arrival of a record from New Jersey, which was so imperfectly exemplified, that it could not be offered in evidence. To this it was answered, that there had been no *subpœna* taken out for the absent witness: and that as the action had been depending for more than two years, there was evidently a *laches* in not obtaining the exemplification sooner.

BY THE COURT.—It is certainly a great default, that an earlier appli- *107] cation was not made for the exemplification; and *that instructions were not given to some person, to see that it was regularly made out. On that ground alone, therefore, the motion must be granted: But even if the plaintiff had been guilty of a *laches;* if it was a misfortune, and not negligence, that had prevented the seasonable arrival of the record, we should still doubt the propriety of refusing the rule.

*108] *RESPUBLICA v. MATLACK.

Continuance.

A cause will be continued, when the defendant is absent, in the plaintiff's service.

APPEAL from the settlement of the defendant's accounts by the comptroller-general. The defendant had been appointed a commissioner, by the executive council, to explore the navigable waters of the state; and on account of his absence upon that service, *Lewis* had moved, at the preceding term, and now moved again, to postpone the trial. The *Attorney-General* observed, that the appellant was not in duress, and might, if he pleased, attend. If, therefore, the cause was put off at this time, he hoped, at least, a peremptory rule for trial at the next term would be entered.

And whether it is their opinion, that interest during the war should be paid? And at the same time, they pass the act directing the courts to suspend rendering judgment for any interest that might have accrued between April 19 1775, and January 20 1783. But in 1787, when there was a general compliance enacted through all the United States, in order to see if that would produce a counter-compliance, their legislature passed the act repealing all laws repugnant to the treaty, and their courts, on their part, changed their rule relative to interest during the war, which they have uniformly allowed since that time. The circuit court of the United States, at their sessions at ———, in 1790. determined, in like manner, that interest should be allowed during the war. So that, on the whole, we see that, in one state, interest during the war is given in every case, in another, it is given wherever the creditor, or any agent for him, remained in the country, so as to be accessible; and in the others, it is left to the courts and juries to decide according to their discretion and the circumstances of the case."

By the Court.—It would wear an aspect of hardship, if the trial were to be forced on, at the very time that the plaintiff had engaged the defendant in his service, and sent him to a distance. But let a peremptory rule for trial at the next term be entered.

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*Respublica v. Coates. [*109

Trial by proviso.

The defendant cannot have a rule for trial by proviso, against the commonwealth.

This was an action on an official bond executed by the defendant; and the real plaintiff having neglected to strike a jury, the defendant's counsel moved for a rule for trial by proviso; but on a suggestion from the *Attorney-General*, approved by the court, that such a rule could not be granted against the commonwealth, the motion was made for a peremptory rule to try at the next term; under which, the court said, they would order the jury to be qualified.

Levy, for the plaintiff; *Sergeant*, for the defendant.

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*Borger v. Searle. [*110

Practice.

A rule to show cause of action will not be granted, on the last day of the term.

On a *capias*, returnable to the present term, *Lewis*, this day, moved for a rule to show the plaintiff's cause of action, and why the defendant should not be discharged on common bail; offering, at the same time, to file an agreement, that the question might be heard before a single judge at his chambers.

Bradford objected, that this being the last day of the term, the motion was out of season. He did not dispute the power of the court; but he appealed to their discretion, whether it would not be unreasonable to suspend the cause for three months, by granting the rule at so late a period.

By the Court.—The motion is certainly out of time. Before the return of the *capias*, a question of bail may be brought before a single judge; but after the return, it must be decided on an application to the court: which ought to be made, on the first day, or, at least, within a reasonable period, after the commencement of the term. The present motion cannot, therefore, be granted.

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*Vasse v. Spicer. [*111

Practice.

The defendant will not be permitted, when the jury is called, to retract his plea, and enter judgment by *non sum informatus*.

Issue had been joined in this cause, and the jury were at the bar, ready to be qualified for trying it, when, *Sergeant* moved for leave to retract his plea, and to enter judgment by *non sum informatus*. *Rawle* and *Du Pon-*

ceau, for the plaintiff, opposed the motion. And *Lewis*, as *amicus curiæ*, observing that the question was of general importance, hoped that the court would take this opportunity of correcting, what he considered to be an unreasonable and unwarrantable practice. In support of his opinion, he referred to Style Pr. Reg. 371; Jac. Law Dict., Tit. "Judgment;" 2 Lill. Abr. 104; 5 Com. Dig. 186; 2 Brownl. 196.

By the Court.—It has been a practice, for the plaintiff's attorney to accept a judgment in the mode proposed by the motion; but the point, for allowing the defendant's attorney, either as matter of right, or indulgence, to retract his plea, under such circumstances, has never been brought before the court, on argument. The inconvenience of the delay, where, in fact, there is no dispute, is, however, so palpable, that we cannot give a judicial countenance to the practice. Therefore, let the jury be called.

Ex parte Holker.

Special court.

A going defendant is entitled to a special court, though he has a resident partner, who could remain.

Dallas moved for a special court to try various actions in which Mr. Holker was defendant, jointly with Duer and Parker; but it was objected by *Lewis*, that the reason of the act of assembly, for granting special courts, did not apply to cases, where there were partners, who could remain, during the usual course of proceeding, to defend the causes, and who did not join in the application.

By the Court.—The objection is not sufficient to justify the refusal of a motion for a special court. The legislature intended to relieve defendants, who were ready and willing to proceed to trial; and accelerating a decision cannot possibly injure the plaintiffs, unless some material witness is absent; which has not been pretended in the present case. The rule for a special court must, therefore, be granted.

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*112] *Respublica v. Griffiths.

Criminal information.

An information, at the relation of a private person, must be drawn and prosecuted by him, using the name of the attorney-general *pro formâ*.

Leave having been granted, on the motion of *Sergeant*, to file an information against the defendant, one of the Justices of the Peace for Chester county, it became a question, whether the information should be drawn, filed and prosecuted by the attorney-general, or by the party at whose instance it was awarded.

The Attorney-General (*Bradford*) objected, that it is not the duty of the attorney-general to draw and file this information. It must, indeed, be in the name of the commonwealth, and the prosecutor may make use of the name of the officer, who prosecutes for the state; but there is, in England,

a known and established distinction, between informations filed by the attorney-general, and those filed by him, at the relation of a private person, in the name of the master of the crown office. The former are always filed *ex officio;* and the court will not, upon motion of the attorney-general, give him leave to file an information against any person. 3 Burr. 1812. They cannot be quashed, on motion of the prosecutor (Dougl. 227); nor is the prosecutor liable for costs. But informations, at the relation of private persons, are in a great measure private suits. They are moved for and conducted, not by the officers of the crown, but by counsel employed by the prosecutor. The prosecutor is, in many cases, liable to costs. 3 Burr. 1270, 1305. The court will not grant it, where the prosecutor appears unworthy. Burr. 548, 869. And on a motion for an information for a libel, oath must be made of the falsity of the charges contained in the libel, a circumstance quite immaterial, where the prosecution is wholly on the part of the public. The prosecutor, therefore, ought to be at the expense and employ his own counsel, in this proceeding, in which he is really interested. If it be the duty of the attorney-general to file this information, it is his duty to prosecute it also.

No informations (except those *qui tam*) have hitherto been filed in Pennsylvania; and it is of consequence to settle this point. No fees are provided for the duty, in the bill of fees, and the attorney-general ought not, on this occasion, to be considered as the mere drawer of an information, for which he is not to be paid, and with the future prosecution of which he has nothing to do.

*By the Court.—The objection is reasonable and just. But, *pro formâ*, the attorney-general must allow his name to be used by the prosecutor. [*113

SEPTEMBER TERM, 1790.

Walker *et al.* v. Wallace *et al.*

Costs.

A garnishee in foreign attachment is not liable for costs, unless more be found in his hands than he admits by his plea or answer.

This was a *scire facias* against the defendants, as garnishees of Waldo against whom a foreign attachment had been issued. On the trial, it was ruled—

By the Court.—That if a plaintiff does not prove more in the hands of the garnishee, than he admits by his plea to the *scire facias*, or his answer upon interrogatories, the plaintiff must pay the costs. But if more is proved, then the costs shall be paid by the garnishee.

The verdict being for no more than the sum admitted in the answers of the defendants, judgment was, accordingly, entered for the plaintiffs, but without costs.

FERGUSON, captain of militia, *v.* BARON, a private.

Certiorari.—Error.

A party cannot object to an error, in his favor; such as, giving him notice, when he was not entitled to it.

ON the return to a *certiorari*, issued to remove the record of the proceedings that were had in this case, before Justices McKnight and Todd, it appeared, that the defendant, having been tried by a regimental court-martial, for a breach of the rules of discipline, was fined to the value of ten days' labor (1*l.* 15*s.*), that on an application made by the plaintiff, who acted as clerk of the company, to the justices, they issued a summons to the defendant; and that, on the return of the process, they gave judgment conformable to the sentence of the court-martial.

Bradford, in support of the judgment, read the proceedings of the court-martial; and the section of the militia act, relative to the recovery of fines.

Levy contended, that the justices had proceeded without jurisdiction; for, their authority under the act was merely ministerial, to issue an execution; whereas, they had undertaken to hold plea on the subject-matter.

*114] *BY THE COURT.—It is an extraordinary objection, to proceed from the defendant, that he had notice before an execution issued against him. The measure was a liberal and indulgent one; and ought not to be discountenanced, if in general practice.

Judgment affirmed.

OVERSEERS of COVENTRY *v.* CUMMINGS.

Certiorari.—Return.

On *certiorari*, the court must take the case as stated in the return, without travelling into the merits.

CERTIORARI to remove the record of proceedings before Justice Bartholomew, to which the following return was made: "On hearing the matters between the parties, I gave judgment for plaintiffs for a debt of 38*s.*, with 17*s.* 3*d.* costs: 30*s.* of which was money said defendants sued plaintiffs for, before Daniel Griffith, Esq., on account of John Ralston, Esq., and self, which thing he had no orders from us to do, and the remainder, 8*s.*, being the costs the plaintiffs paid on said action. Execution granted for said debt and costs to the plaintiffs; and the costs paid by them."

Lewis and *Todd* excepted to the judgment, that Justice Bartholomew had undertaken to decide upon a matter, which had been previously decided by another justice.

Bradford and *Sergeant* objected to go into the merits of the case.

BY THE COURT.—If the return is false, the justice is liable to an action, at the instance of the injured party: if he has acted contrary to justice, an information will be granted against him. But in the present state of the business (though we highly disapprove of the interference of a justice in any

matter previously decided by another justice), we must take the case as stated upon the return, without travelling into the merits of the original question.

Judgment affirmed.

VANSCIVER *v.* BOLTON.

Certiorari.—Practice.

The defendant's affidavit, that the case was decided by the justice, upon the plaintiff's oath alone is sufficient to cast the *onus probandi* upon his adversary.

CERTIORARI to remove the judgment of a justice of the peace. As cause for reversing the judgment, *Levy* showed, by the defendant's affidavit, that the debt had been proved before the justice, by the plaintiff's oath alone. *Howell* objected, that this was not sufficient, as the plaintiff might have sworn to his books; and at all events, the exception to the judgment cannot be supported by the mere showing of the defendant's affidavit.

*McKEAN, Chief Justice.—The oath of the interested party cannot singly be admitted to maintain his demand: nor, is it merely upon a [*115 plaintiff's oath, that an original entry in his books is received in our courts as evidence; since that, when allowed its utmost latitude, proves nothing more than the sale and delivery of the goods.

With respect to the mode of establishing the exception to the judgment, the affidavit of the defendant, though not conclusive, must, at least, be deemed sufficient for throwing the *onus probandi*, if other evidence was produced, upon his adversary.

TARIN *v.* MORRIS *et al.*

Costs.

The indorser of a note is liable for costs, though satisfaction be obtained in an action against the maker.

THE plaintiff was indorsee of a note, which was drawn by Gheir, in favor of the defendant, William Morris. Soon after the present action was brought, the defendant became bankrupt; and another suit was instituted on the same note against Gheir, the maker, in which judgment had been obtained for the debt and costs. The defendant's certificate being still in suspense, *Ingersoll* moved, that judgment should likewise be entered in the present action, for costs; stating that several suits may be brought against all the parties to a bill or note; and that although only one satisfaction can be recovered, yet execution for costs might be issued in all the suits. Bail. B. of Ex. 43; 2 Ves. 115. But *Sergeant*, for the defendant, urged, that this was a hard case, as his client was originally only an indorser, and had become a bankrupt; that it was at the peril of the holder of a bill or note, so far as respects the costs, if he sued, for one satisfaction, all the parties that were liable to make it; and that, in the case cited, judgment had previously been obtained in all the suits; while, in this case, judgment has not been obtained, and is only requested for costs.

By the Court.—We entertain no doubt upon this subject: It is the case of several persons, severally bound, and severally sued, where, until one has actually made the satisfaction, all are liable to make it. The cases cited clearly express the principle.

Let judgment be entered for costs.

APRIL TERM, 1791.

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*116] *Douglass's Lessee *v.* Sanderson.[1]

Evidence.

The plaintiff is competent to prove the death of a subscribing witness, in order to let in proof of his handwriting.

A leaf cut out of a family Bible, and certified by a notary of another state, admitted to prove pedigree.

On the trial of this cause, before Judge Bryan, at *nisi prius*, in Cumberland, in November 1790, the plaintiff offered in evidence a deed, and to prove its execution by the handwriting of one of the witnesses, who was dead. The other witness was said to be dead also; and to prove this, they offered the plaintiff himself, to testify that the witness had formerly lived in Philadelphia, that he had made inquiries for him, and heard he was dead. This testimony was objected to; but on argument, it was admitted, the judge reserving the point.

The plaintiff then offered a leaf, said to be cut out of a family bible, on which were written the names of the children of one McMichael, under whom the lessor of the plaintiff claimed, with the times of their respective births; which leaf was annexed to a notarial certificate from another state, setting forth, that the same was cut out of the bible, in his, the notary's, presence, and that the same was sworn before him, to be the property, and family bible, of the said McMichael, then deceased. To this, exception was also taken; but the evidence was admitted, and the point in like manner reserved.

On the return of the *postea*, *Bradford* obtained a rule to show cause why there should not be a new trial, and at April term 1791, the cause was argued.

Bradford, for the defendant, contended, that the evidence ought not to have been admitted in either case. Upon the first point, he said, the rule was, that the subscribing witness must be produced, unless proof be made that he is dead, or cannot be found. That this proof must be by disinterested witnesses. That a party might be admitted, in case of necessity, as where a writing had been lost, and in similar cases; yet this was only *ex necessitate*. That the fact in question was capable of proof by various means; by the register of his burial; by persons acquainted with him; by general report testified by disinterested witnesses. That in this case, strict

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[1] s. c. 1 Yeates 15.

proof was required. The rule laid down in *Henly* v. *Philips*, 2 Atk. 48, is, that the court would not require a certificate of the funeral, yet there must be evidence of his death; strict proof, if he resided abroad, but slighter evidence, if he resided in England. That it was analogous *to depositions, and there, proof by other witnesses ought to be given of the [*117 deponent's death. That all the cases required proof, which must be understood, by disinterested witnesses. 1 Atk. 445; 2 Str. 920; Gilb. For. Rom. 140; Show. 363.

Upon the second point, he admitted, that slighter evidence was required of pedigree than of many other things, such as general report, declarations of parents, after their death &c., but he urged, that this general report must be proved on oath, before the court; and that the declaration of parents who could be produced and sworn, and were alive, was no evidence. Cowp. 591. So, inscriptions on tomb-stones, or entries in family bibles; but the testimony of such inscriptions, or of such entries, must be in the usual course. Copies of parish registers were good; yet even these must be proved, on oath, to be true copies. In this case, there was no regular proof that the leaf of the bible produced was ever cut out of the family bible of McMichael. It depended partly on the notary's certificate, and partly on the *ex parte* deposition taken before him in the adjoining state; neither of which were evidence.

Lewis showed cause against the rule, and urged, that the first was a captious exception, the merits being clearly with the plaintiff, and that the evidence only came in aid of other proof. That he considered the first point as settled, having been so ruled in the case of *Levans' Lessee* v. *Hart*. That in the *Lessee of Morris* v. *Flora*, the deposition of a witness was read, on proof, by oath of the plaintiff, that the witness was infirm and unable to attend. That none of the cases say it must be by disinterested proof; and the law does not require the same strictness in the proof offered to satisfy the conscience of the court, that it does in the proof offered to a jury.

On the second point, he urged, that slight proof was sufficient in the case of pedigree; and that this evidence admitted by the judge was only corroborative of other proof, and therefore, as justice had been done, no cause for a new trial. He said, that *ex parte* affidavits had often been admitted in evidence, particularly in the case of *Fogler's Lessee* v. *Simpson*, tried at Lancaster 178–: and that though these were affidavits taken beyond seas, that there could be no line drawn, but the jurisdiction of the court. That hearsay being sufficient evidence in case of pedigree, this was stronger, being on oath, and certified by a notary.

Bradford, in reply, observed, that the case of *ex parte* affidavits had been confined to those of persons beyond seas, and it would be very pernicious to extend the rule. That the only circumstance that could give any validity to the leaf in question, was regular proof of its being in the bible of McMichael, and written by him, or by his directions. But no legal proof was given when *the entries were made, nor that it was his bible. [*118 Besides, it was mutilated evidence, and the book itself ought to have been produced.

THE COURT were clear, on the first point, that the plaintiff was a good

witness to prove the death of the subscribing witness, in order to let in evidence of the handwriting; and seemed to consider it as the common practice.(a)

On the second point, the CHIEF JUSTICE observed, that the rules of evidence, with regard to pedigree, were by no means strict; and that the COURT were inclined to think, that the evidence admitted by the judge who tried the cause, was sufficient in such a case.

SHIPPEN, Justice.—It must not be understood, that *ex parte* affidavits, taken in other states, are admissible evidence in cases of pedigree. I concur in the opinion of the court, upon the peculiar circumstances of the case, and the production of the paper itself. The general principle, attempted to be inferred by the defendant's counsel, must not be considered as involved in this decision.

Rule discharged.

SEPTEMBER TERM, 1791.

RESPUBLICA *v.* LACAZE *et al.*[1]

Debt.— Voluntary stipulation.—Interest.—Practice.

An action of debt lies upon an express contract in writing, without specialty.

A voluntary stipulation, given in the admiralty, in a case in which there is no jurisdiction, is a valid obligation at common law.

Legal interest is the usual measure of damages for delay of payment.

A motion for a new trial cannot be made, after a motion on arrest of judgment; the latter tacitly admits the verdict is good.

THIS was an action of debt in the *debet et detinet*, for 4000*l.* sterling, equal to 6666*l.* 13*s.* 8*d.* currency, brought in the name of the Commonwealth, for the use of Lewis Lanoix, against James Lacaze, Michael Mallet and John Ross, upon a writing signed by the defendants, dated the 4th of November 1783, and taken in the court of admiralty of Pennsylvania, in the nature of a caution or stipulation. The information (which states the whole case) was in the following words:

"Philadelphia County, ss.

James Lacaze, Michael Mallet and John Ross, all late of the city of Philadelphia in the said county, merchants, were summoned to answer the Commonwealth of Pennsylvania in a plea, *that they render to the said Commonwealth, for the use of Lewis Lanoix, the sum of six thousand six hundred and sixty-six pounds, thirteen shillings and eight pence, which to the said commonwealth they owe and unjustly detain, &c. And thereupon, William Bradford, Jr., attorney-general of the said commonwealth, on behalf

*119]

(a) See 1 W. Black. 532, where the plaintiff himself was examined: and Godb. 193, 326; Shower 363.

[1] s. c. Yeates 55.

of the said commonwealth, giveth the court here to understand and be informed, that whereas, on the twenty-fourth day of October, in the year of our Lord 1783, the said James Lacaze and Michael Mallet exhibited their bill to the Honorable Francis Hopkinson, Esq., judge of the court of admiralty for the state of Pennsylvania, setting forth, that by the process of the same court, five barrels of silver coin, amounting to five thousand two hundred and eighty-five French crowns, and one thousand five hundred and eighty dollars, then lately before saved from the wreck of the brigantine Count Durant, whereof Anthony Fourne was commander (and upon whose suit or libel in the same court depending, the said process had issued), had been taken into the custody of the marshal of the said court, and that the said silver coin was the property of and did belong to Lewis Lanoix, merchant, residing in Bordeaux, and that they, the said James Lacaze and Michael Mallet, then were the agents of the said Lewis, and did transact the business of the said Lewis, and that, the same coin ought to be delivered into the hands of them, and the said James Lacaze and Michael Mallet, in order that the same might be forthwith remitted to the said Lewis Lanoix: And whereas, upon the said bill of them, the said James Lacaze and Michael Mallet, the said judge did order and decree, that the said silver coin (after deducting therefrom all costs and charges for saving the same from the wreck aforesaid, and prosecuting the several claims in the said court against it) should be delivered into the hands of the said James Lacaze and Michael Mallet, for and on account of the said Lewis Lanoix, or the right owner thereof, in order that the same might be forthwith remitted to the said Lewis, agreeably to the tenor of the said bill, they the said James Lacaze and Michael Mallet giving caution for the performance of the trust reposed in them, agreeably to the practice and usage of the said court, and the laws of this commonwealth: In consideration whereof, the said James Lacaze and Michael Mallet and John Ross, afterwards, to wit, on the fourth day of November 1783, at the said county, appeared before the said Francis Hopkinson, Esq. judge of the court of admiralty as aforesaid, and then and there stipulated and acknowledged themselves to owe and be indebted to the said commonwealth, in the sum of 4000*l.* sterling money aforesaid (equal in value to the sum of 6666*l.* 13*s.* 8*d.* aforesaid), to be paid to the said commonwealth, in case the said James Lacaze and Michael Mallet did not well and faithfully perform the trust in *them reposed, respecting the said silver coin, or should fail to indemnify the said judge [*120 and the officers of the said court against all persons lawfully claiming the same, and against the claims of him the said Lewis Lanoix. And the said attorney-general further giveth the court here to understand and be informed, that the said marshal afterwards, to wit, on the 6th day of November, in the same year, by virtue of the writ of the same court (commanding him the said marshal, after deducting all costs and charges for the saving the said silver coin from the wreck aforesaid, and prosecuting the several claims against it in the said court, to pay over and deliver the remainder of the said five casks of silver coin to the said James Lacaze and Michael Mallet, to be by them remitted forthwith to the said Lewis Lanoix), did deliver and pay over to the said James Lacaze and Michael Mallet, one thousand five hundred and eighty dollars, and six thousand three hundred and thirty French crowns. And the said attorney-general further saith, that the said

James Lacaze and Michael Mallet, their duty in this behalf not regarding, did not well and faithfully perform the trust in them reposed, respecting the said silver coin, and did not, nor did either of them, remit the said silver coin to the said Lewis Lanoix, but the same to remit, pay or deliver to the said Lewis, hitherto have entirely neglected and refused. By reason whereof, action hath accrued to the said commonwealth, to demand and have of the said James Lacaze, Michael Mallet and John Ross, the said sum of 4000*l.* sterling money, which on the same 3d day of November, were and still are of the value of 6666*l.* 13*s.* 8*d.* Nevertheless, the said James Lacaze, Michael Mallet and John Ross, although often requested, to wit, on the 1st day of July, in the year of our Lord 1786, at the county aforesaid, the said sum of 4000*l.* sterling money aforesaid, or the sum of 6666*l.* 13*s.* 8*d.* equal in value thereto, to the said commonwealth have not paid; but the same to pay, hitherto have, and still do refuse to pay, to the damage of the said commonwealth, 500*l.*: And thereof, the said attorney-general informs the court here, and prays judgment against the said James Lacaze, Michael Mallet and John Ross, for the cause aforesaid.

JOHN DOE, } Pledges
RICHARD ROE, } prosecutors."

The defendants pleaded, 1st, Payment, 2d, *Nil debent;* and the issues were tried in September term last, when a verdict was found in favor of the plaintiff, for the sum of 3763*l.* 9*s.* 7*d.* A motion was, thereupon, made in arrest of judgment, and for a new trial; which was argued in July term, 1791, by *Du Ponceau, Coxe, Bradford* and *Sergeant*, for the plaintiff, and by *Moylan, Mifflin, Ingersoll, Randolph* and *Lewis*, for the defendants.

*121] *The Chief Justice now delivered the unanimous opinion of the Court.

McKEAN, Chief Justice.—The defendants have moved, that the judgment rendered on the verdict in this cause, should be stayed, on seven grounds; and they have assigned one ground, upon which a new trial ought to be granted.

A motion for a new trial should not be made, after a motion in arrest of judgment, unless in cases where the party had no knowledge of the fact, at the time of moving in arrest of judgment. For, by moving in arrest of judgment, you tacitly admit the verdict is good. 2 Salk. 647; Bull. N. P. 326; and 1 Burr. 334.[1] This is also settled by the 32d printed rule of this court; by which it is ordered, that no motion for a new trial shall be made, after a motion in arrest of judgment. I shall, therefore, in the first place, consider the reason offered for a new trial.

It has been said, that the verdict was against evidence, because the jury allowed interest on the sum demanded, 2663*l.* 5*s.* 2*d.*, for two years and nine months more than they ought to have allowed, to wit, from the 4th of November 1783, the date of the writing on which the action is brought, until the 23d of July 1786, when the writ was served; alleging that Lewis Lanoix, for

[1] It has been the practice, for many years, in the courts of Philadelphia, to allow both the motion in arrest of judgment, and for a rule for a new trial; and although not technically correct, a practice of such long standing will not be disturbed. Rohrbacker *v.* Pugh, 10 W. N. C. 275, THAYER, P. J.

whose use the information is exhibited, had, by his own orders, suspended the remission of the money to him, during that period.

This allegation is made on the deposition of John Sabloniere, who said, that Mr. James Lacaze arrived at Bordeaux, in March 1784, and in a conversation with Lewis Lanoix, on the 9th of April, he, Mr. Lanoix, agreed to keep the bills of exchange, drawn by Lacaze & Mallet, upon Lacaze & Sons, for the sum due, and desired Mr. James Lacaze to write to Mr. Mallet, his partner in Philadelphia, not to remit the silver; which was done; and it did not appear in evidence, that any further demand was made, until the 23d of August 1786, the day on which the writ in this cause was served.

Upon this evidence, the jury may have concluded, that Mr. Lanoix only excused the remittance of the silver, during this time, merely as an indulgence to Lacaze & Mallet, and from an expectation that Lacaze & Sons would honor the bills; but being disappointed, he ought to have interest for the money, as if no such indulgence had been granted; that the forbearance was at the instance of James Lacaze, and to oblige him, and that Lanoix should not be a loser by it. The jury, perhaps, should not have allowed interest for the time it would have reasonably taken to remit the silver from Philadelphia to Bordeaux, for Mr. Lanoix. Be this as it may, it was a fact properly within the province of the jury; it was their duty to consider and determine it; and in such cases, though legal interest is *the usual measure of damages for delaying payment, the court cannot interfere. [*122 I am, therefore, of opinion, that a new trial ought not to be granted.

With respect to the reasons in arrest of judgment, I think they may be comprised within three heads.

1st. That it does not appear on the record, that the original cause, concerning the five casks of silver, was within the jurisdiction of the court of admiralty.

2d. That if it was not, Anthony Fournie, master of the brigantine Count Durant, had no right, by the common law, to take such a writing, as the one now sued, from the defendants.

3d. That, if such a writing could be taken by the common law, yet an action of debt upon it could not be maintained.

I. As to the first: It is recited in the information by the attorney-general, that the libel in the court of admiralty was concerning five barrels of silver, saved from the wreck of the brigantine Count Durant, and put into the custody of the marshal, and nothing more, except that salvage was decreed to Anthony Fournie, for saving it. Shipwreck is a matter of revenue. In a legal wreck, the goods must come on shore. *Jetsam*, *flotsam*, and *ligan*, are not matters of revenue, and are cognisable in the admiralty; but wreck is determinable by the common law. 1 Black. Com. 290; 3 Ibid. 160; 5 Co. 106, 107; 6 Vin. 512, pl. 5. It is not alleged, that the silver was *jetsam*, *flotsam* or *ligan*, or that the cause arose upon the high seas, or within the admiralty or maritime jurisdiction; but, if we travel out of the record, the contrary appeared from the evidence; that the master (Fournie) had signed a bill of lading for it; that it was never out of his custody; that he carried it on shore at Lewistown, in the Delaware state, and from thence to Philadelphia, by land. 1 Vent. 308; Carth. 423; (*Montgomery* v. *Henry*) 1 Dall. 50. All the proceedings of a court having no jurisdiction, are void. 1 Salk. 201. From which, it rather seems, that

the court of admiralty had no jurisdiction of the original cause, from any allegation, averment or other matter appearing in the information; and that this writing would not warrant a suit in that court. But as to this, it is not necessary to give a positive opinion.

II. I will then consider the second point, whether Fournie could take this writing, by the common law, from the defendants? Although a court of admiralty cannot take a recognisance, which is a bond or obligation of record (that court not being a court of record, nor the judge, a judge of record, 6 Vin. Abr. I, 500, pl. 1), yet, it can take a caution or stipulation; which is usually for appearance, or to perform a decree, &c., and is in nature of a recognisance. It appears, that the *proceedings in the admiralty *123] were without the participation or knowledge of Lewis Lanoix; that no coercion was used by the court; that all was voluntary, and not only by consent, but on the application, of the defendants. There is no positive law for declaring such a writing void; it was not given for anything against goods morals, or illegal, but for a meritorious valuable consideration, to wit, a sum of money delivered in specie, and for an honest purpose. If the taking this writing in the court, cannot give it any additional sanction, so, on the other hand, it cannot destroy or prejudice its legal operation. Though void as a stipulation, it is good as a contract; just as it was determined in the case of *Ascue* v. *Hollingsworth*, Cro. Eliz. 544, that an instrument, which was void as a statute-staple, was yet good as an obligation; and the case in 2 Strange, 1137, favors this opinion.

For these reasons, I think, this transaction may be considered as done out of court; and that it is good and binding on the parties, by the common law.

III. The next and principal question is, whether the present information in debt upon this writing is maintainable? It has not been doubted, but that a special *assumpsit* would lie in this case; but it has been denied, that an action of debt will lie. A debt is a sum of money due by express agreement; either in writing, or by parol, where the quantity is fixed, and does not depend on future calculation—the non-payment or non-performance is an injury, for which an action of debt may be brought. 3 Black. Com. 153; Fitzh. N. B. 145; 1 Lill. Abr. 554, C.; 2 Bac. Abr. 13. And it is held in (*Smith* v. *Avery*) 6 Mod. 129, that a meritorious valuable consideration will raise a debt. If A. gives money to B., to buy wares, or any other thing for him, and B. does not buy them, debt will lie for the money (7 Vin. Abr. title "Debt," K, pl. 26); for, by the delivery of the money, as it cannot be known again, the property is altered, and a duty arises.

Debts, for which an action of debt may be brought at common law, may be classed under four general heads:

1st. Judgments obtained in a court of record on a suit.

2d. Specialties acknowledged to be entered of record, as a recognisance, statutes merchant, or staple, or such like.

3d. Specialties indented, or not indented.

4th. Contracts without specialties, either express or implied.

The present action comes under the last head, and is founded on an express contract in writing, whereby in consideration of five barrels of silver coin, delivered by Anthony Fournie, by the advice of the court of admiralty, to the defendants, they promise and engage to remit them to Lewis Lanoix,

at Bordeaux, *or to pay to the commonwealth 4000*l.* sterling for his use. The writing is in the form of a recognisance, taken as a stipulation in the admiralty, but deriving no advantage or prejudice therefrom: It is a legal, fair and honest contract, grounded upon a meritorious and valuable consideration; and although Mr. Ross is only a surety (and I am sorry he is such), yet, unless he had entered into the writing, the contract might not have been made; he has become a party in it, and is responsible for the performance, equally with the other defendants. The sum demanded is fixed and certain; there was a duty certain, which has not been performed, for which an action of debt lies. And, although I should have preferred an action of special *assumpsit;* yet, I conceive an action of debt is maintainable.

The Commonwealth must be considered as a trustee for Lewis Lanoix, on the authority of 1 Vern. 439; 1 Ves. 453; 4 Burr. 2110. The verdict has been taken in the manner long practised in Pennsylvania, though peculiar to it, and is in consequence of an act of assembly. Upon the whole, the court unanimously agree, that the judgment be entered for the plaintiff.

Judgment for the plaintiff.(*a*)

APRIL TERM, 1791.

Respublica *v.* Roberts.[1]

Criminal law.—Adultery.

An unmarried man cannot be convicted of adultery with a married woman.
On an indictment for adultery, the defendant may be convicted of simple fornication.

This was an indictment for adultery, which had been found in the quarter sessions of Bucks county. The woman was married; but the indictment did not state the defendant to be so; and indeed, the contrary was allowed, in the course of the argument, to be the fact. The question brought before this court was, whether, in such circumstances, the defendant would be convicted and sentenced for adultery, under the act of assembly? (1 Dall. Laws 47) the *Attorney-General* *contending for the affirmative of the proposition, and *Sergeant* opposing it. [*125

The Court, after consideration, delivered an unanimous opinion, that under the act of assembly, and the uniform practice of eighty-five years (a practice, which, though it does not make the law, must be strong evidence of what the law is), the indictment could not be supported on the charge of adultery: but that the judgment for fornication only, must be pronounced against the defendant.

Judgment accordingly.

(*a*) The defendants brought a writ of error; but on the 11th July 1793, the judges of the high court of errors and appeals unanimously affirmed the judgment of the supreme court.[2]

[1] s. c. 1 Yeates 6.

[2] See Addison 59, for a report of this case in the high court of errors and appeals.

LEECH *v.* ARMITAGE. (*a*)

Opening and conclusion.—Former recovery.

In trespass for cutting trees, the defendant pleaded *liberum tenementum*, to which the plaintiff replied *liberum tenementum suum, absque hoc, &c.;* held, that the plaintiff had the affirmative of the issue, and was entitled to open.

Where a former judgment between the same parties is given in evidence, it is not competent for the opposite party, to prove that the evidence now given by him, was not produced on the former trial, nor then discovered.

THIS was an action of trespass for cutting trees. The defendant pleaded *liberum tenementum;* and the plaintiff replied *liberum tenementum suum, absque hoc, &c.* The trial came on at *nisi prius*, in Montgomery county, before the CHIEF JUSTICE and Judge SHIPPEN, on the 28th April 1791.

A preliminary question arising, who should open the cause, it was decided by the COURT, after argument, that the proof of the issue lay upon the defendant; and that he, therefore, ought to begin. The CHIEF JUSTICE added, that in all cases, the party who is first in the affirmative ought regularly to open; and referred to *Forsythe* v. *Jones*, tried at *nisi prius*, in Chester county, where the same point was ruled.

On the trial of the cause, the defendant gave in evidence the record of a trial, verdict and judgment between the same parties, at a former period; to wit, in the year 1755. The plaintiff, thereupon, offered to prove by a witness, who was present at the former trial, that the evidence now given by the plaintiff, was not then produced nor discovered: but the proof was objected to, and the court refused to admit it.

BY THE COURT.—It would be too dangerous to trust to the recollection of a witness, in so old a transaction, in order to shake the strength of the evidence which the record imports.

SEPTEMBER TERM, 1791.

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*126] *JOY'S Lessee *v.* COSSART *et al.*[1]

Bankruptcy.

To confer jurisdiction, under the act of 1785, there must have been a trading, a debt contracted, and an act of bankruptcy, subsequently to the passage of the statute.

Any person in interest may contest the legality of the petitioning creditor's debt.

EJECTMENT for a house in the city of Philadelphia. The lessors of the plaintiff were assignees, under a commission of bankruptcy issued against one Christian Wirtz, of whom Doctor Charles Moore, the landlord of Cossart, had purchased.

(*a*) Decided at Montgomery *nisi prius*. s. c. 1 Yeates 104.

[1] s. c. 1 Yeates 50.

Upon the general issue, it was contended by the defendants, that the commission had issued irregularly, and was void, for the following reasons:

1st. The act of bankruptcy, alleged to have been committed by Wirtz, was a conveyance of a lot of ground, to one of his children, by deed, and without a valuable consideration. This, it was admitted, was fraudulent and void under the statute of 13 *Eliz.*, but not an act of bankruptcy.

2d. The debt of the petitioning creditor was not within the act for the regulation of bankruptcy, which was passed the 17th September 1785; and which provides, that the debts of the petitioning creditor shall "have arisen on a contract, or transaction, subsequent to the passing of the act." 2 Dall. Laws 369, § 3. Now, the debt due to the petitioning creditor was on a running account, every item of which was prior to June 1785, and which was thus indorsed: "We do acknowledge the within account to be just and true, errors excepted; and also excepting all such remittances as we have already made, since rendering the same, and which had not then come to the hands of Joy & Hopkins; and we promise to pay the balance thereof, being 3904*l.* 6*s.* 10*d.* sterling, to Joy & Hopkins, in London, or their order or agents here, with interest at five per cent. June 3, 1788. (Signed) C. Wirtz. W. Wirtz." This, the defendant's counsel contended, was no extinguishment or satisfaction of the original debt; and therefore, not within the meaning of the act.

In answer to the first point, the *plaintiff's* counsel insisted, that every fraudulent conveyance by deed, was an act of bankruptcy. To the second point, it was answered, that the indorsement on the account was a real promissory note, which operated as a satisfaction of the original contract. But at all events, *it was strongly urged, that it did not lie with third persons to inquire into or dispute the regularity of the proceedings under a commission of bankruptcy. [*127

The Court charged the jury, in favor of the defendants, on the two last points; but left it to them to determine, whether the first was, or was not, an act of bankruptcy; inclining to think that it was: and the plaintiffs were desired to move for a new trial, if they doubted the direction of the court.

A verdict being found for the defendants, the motion was made and argued in July last, by *Lewis*, *Tilghman* and *A. Morris*, for the plaintiffs, and by *Ingersoll*, *Sergeant* and *Rawle*, for the defendants. At the present term, the unanimous opinion of the court was delivered to the following effect.

By the Court.—After stating the preceding transactions, and the several points made, the court left it to the jury to determine, on the first point, whether the deed made by Wirtz to one of his children, was, or was not, an act of bankruptcy: we are inclined to think it was.

As to the second point, we are of opinion, that this was not a sufficient debt to support the commission. No action of debt would lie upon this writing alone: it is no extinguishment, nor satisfaction. An *insimul computassent*, indeed, would lie; but that is a derivative action, recurring to the original account, which is prior to passing the act of assembly.

As to the third point made by defendants' counsel, we are satisfied, that

it is competent to third persons, where their interest is affected, to take advantage of the irregularity of the proceedings. Besides the numerous cases cited in *Pleasants* v. *Meng*, 1 Dall. 380, and that case itself, see 2 Burr. 932. Whether a creditor, who has received a dividend, can object to the commission, we will not say; but Doctor Moore, who never did receive a dividend, certainly may object to it.

Let the rule for a new trial be discharged.

SCOTT *v.* CROSDALE.[1]

Dower.

Dower is barred by a sheriff's sale of the lands, under a *levari facias* upon a mortgage, executed by the husband alone, after marriage.[2]

THIS was an action of dower, brought in Bucks county, against the defendant, who had purchased lands, sold by the sheriff under a judgment obtained on a *scire facias* on a mortgage. The mortgage was executed by the husband, but the plaintiff (his widow) was no party to it: and on the trial, Justice ATLEE reserved the point, whether the wife's dower was bound by the mortgage?

Sergeant, for the plaintiff, contended, that there was a distinction as to the effect of a sale under a *fi. fa.* and a *levari facias.* *That, in the *128] latter case, the act (1 Dall. Laws, 71-2) directs, that no greater estate shall be conveyed than the lands are mortgaged for: and in this case, the woman had not done any act to bar her estate in the lands. He added, that in New Jersey, where the act of assembly was very similar, the wife was always held to be entitled to dower.

Wilcocks, after stating that, at Chester, in the case of *Howell* v. *Laycock*, it was determined, that a sale by an executor, to whom lands were devised for the payment of debts, barred the widow's dower, would have proceeded; but—

BY THE COURT.—The point has been too long settled, to be stirred now; and judgment must be for the defendant.

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[1] s. c. 1 Yeates 75.

[2] If the husband convey by deed, in which his wife does not join, and afterwards reacquires title to the land, and mortgages the same, a sale under such mortgage bars the widow's right of dower. Aull v. Bonnell, 11 W. N. C. 376.

THOMPSON *v.* THOMPSON.[1]

Divorce.

A divorce *à mensâ et thoro* may be decreed, in the first instance, where it appears that the person of the wife cannot be safe, though the husband offers to receive her.

LIBEL for a divorce *à mensâ et thoro*, charging the defendant with various acts of cruelty, and indignities that rendered the libellant's situation insupportable. Defendant, *protestando*, &c., pleaded, that before the filing of the said libel, his wife (the libellant) had separated herself from him, and that "he had offered to receive and cohabit with her again, and use her as a good husband ought to do." To this plea, the defendant demurred. *Tilghman*, in support of it, contended, that by the act of assembly "concerning divorces and alimony" (2 Dall. Laws 381), the court were obliged either to suspend, or to discharge, any sentence, separating husband and wife from bed and board, whenever the husband should make the offer that was stated in the answer: and that if this was a good reason to annul a sentence, *à fortiori*, it is a sufficient answer to the complaint of this libel. This too, he added, was agreeable to the practice of the spiritual court in England. *Angier* v. *Angier*, Prec. Ch. 495, where it is said, that alimony continued no longer than until the parties became reconciled, and consented to cohabit.

Sergeant, for the libellant, insisted, that the court had a discretion to suspend or annul the sentence, as the circumstances under which the offer should be made required; or to refuse to do either: and that, at all events, such an offer as was stated in the libel, made before sentence, could not prevent the jurisdiction of the court, nor a separation, where such extreme cruelty was stated to have been used by her husband.

THE COURT inclined to think, that even after sentence, the mere offer of the husband would not, in all cases, be a cause for suspending it; and that the act left them a discretion, upon the offer being made, to hear the wife, and to continue the sentence *in full force, if the circumstances of the case required it: (*a*) But they were clearly of opinion, that the defendant's answer was insufficient, and thereupon, decreed a divorce from bed and board. As to alimony, the defendant not being prepared upon that point, [*129

Curia advisare vult.

SWEENY'S Lessee *v.* TONER. (*b*)

Land law.—Presumption.

Where a settler on the Indian lands occupied them until the breaking out of the Indian war, and then enlisted as a soldier, he was held to be within the pre-emption act of 21st December 1784 (2 Sm. L. 272).[2]

THE material facts, on the trial of this ejectment, appeared to be these: the defendant went into Northumberland county, in the year 1737, and

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(*a*) See Head *v.* Head, 3 Atk. 195.

(*b*) This cause was tried at Sunbury *nisi prius*, in October 1791. s. c. 1 Yeates 499.

[1] s. c. 1 Yeates 75.

[2] See Hughes *v.* Dougherty, 1 Yeates 497; Cook *v.* Eppele, 1 Id. 324; McConnel *v.* Porter, Id. 405.

made an improvement on a tract of land, which tract he afterwards exchanged with his brother, for the one in question, with a view to establish a permanent settlement for his family. The war, however, broke out soon afterwards; and there being a call for soldiers, he enlisted, on the assurance of his friends that they would take care of the premises for him. In the year 1775, the lessor of the plaintiff likewise went into Northumberland county, and obtained possession of the premises, by virtue of a contract in writing with the defendant's brother, in the nature of a lease, by which the plaintiff covenanted to make improvements for the benefit of the defendant. The lease was deposited in the hands of a third person; but the plaintiff's wife, by a trick, got it into her hands and destroyed it, in order to make way for a claim to the land, in the plaintiff's own right. The plaintiff having made considerable improvements, was driven away by the Indians, in the year 1778; and on the 3d of May 1785, he took out a warrant for the premises—the defendant's warrant being dated the preceding day. Upon a hearing before the board of property, there was a decision in favor of the defendant.

The argument turned principally on the construction of the 8th, 9th and 10th sections of the act of the 21st December 1784 (2 Dall. Laws 235), which give a pre-emptive right to those persons, and their legal representatives, "who had heretofore occupied and cultivated small tracts of land, &c., and by their *resolute stand and sufferings*, during the late war, merited that they should have the pre-emption of their respective plantations."

For the *plaintiff*, it was contended, that he was the actual settler contemplated by the law, having remained on the land, until he was driven off by the Indians; which brought him precisely within the favored description of settlers mentioned in the preamble of the subsequent act of the 30th *130] December 1786 *(2 Dall. Laws 487), "Settlers who have been driven from their habitations, in the course of war, or have remained therein, and during the said time, with much suffering and at great risks." The defendant could acquire no right, by merely clearing an acre of land, which was, in fact, a violation of the law; and consequently, he had no power to lease the premises. The "resolute stand and sufferings," which the legislature intended to favor, meant a residence and remaining upon the plantation claimed; defending the very spot from the enemy; and not a general enlistment in the army. The pre-emption was destined for the settlers who defended the soil; other rewards, donation lands, &c., were given to those who became soldiers. The plaintiff, therefore, was not in possession under the defendant; but as soon as he got possession of the lease (and how this was done is of no importance in law), he disavowed any such derivative occupancy, and asserted his own title.

For the *defendant*, it was urged, that the adverse construction put upon the act of assembly, was inconsistent with justice. The plaintiff was, in fact, the defendant's tenant; the possession of the former was the possession of the latter; and the law ought never to be so interpreted as to encourage fraud. Besides, a soldier is always considered to be resident at his home; he makes "a resolute stand" in the service of his country; and is fairly within the meaning of the legislature, expressed in the act already cited. But the act of 30th December 1786 (2 Dall. Laws 487), illustrates and en-

forces this construction, declaring, in the 3d section, that "by a settlement shall be understood, an actual personal resident settlement, with a manifest intention of making it a place of abode, and means of supporting a family, and continued from time to time, unless interrupted by the enemy, or going into the military service of this country, during the war."

By the Court.—This case involves two questions; the one a question of fact, and the other, a question of law. On the former, it is the province of the jury to decide; but, in our opinion, it appears clearly in favor of the lessor of the plaintiff. With respect to the latter, we deem it equally clear, on the same side. The defendant made the first improvement; and he continued his possession, until, at the call of his country, he entered into the army. In doing so, we consider his conduct, at least, as meritorious as the conduct of those who stood their ground, in defence of their own plantations. But by engaging in the public service, he did not relinquish his residence; and regarding (as we must do) the plaintiff in the light of the defendant's tenant, the plaintiff's possession and improvement are, in contemplation of law, the possession and improvement of the defendant.

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*Frey v. Leeper. (a) [*131

Distress.—Replevin.

Where goods are distrained for rent, and replevied, they are liable to execution on a judgment against the tenant, or to a new distress.

The determination of this cause turned on the following point, which was submitted to the court, to wit, whether goods, which, after being distrained for rent, had been replevied, and delivered to the plaintiff in replevin, could be taken in execution.

By the Court.—This point has been already determined in Philadelphia.[1] The lien on the goods is discharged by the security given to the sheriff; and as soon as they are delivered back to the plaintiff in replevin, they are open to execution, or a new distress.

Judgment for the plaintiff.

(a) Decided at Cumberland *nisi prius*, before Shippen and Bradford, Justices, in October 1791.

[1] Woglam v. Cowperthwaite, *ante*, p. 68.

NICHOLAS *v.* POSTLETHWAITE. (*a*)

Legacies charged on land.

Where a testator, having no personal estate, bequeaths several pecuniary legacies, and gives "all the rest and residue of his estate, real and personal," to his son, this makes the legacies a charge on the lands devised.

Where lands are sold, under a judgment against a residuary devisee, pecuniary legacies charged thereon, are payable out of the proceeds of sale.[1]

JOHN DAVIS, seised of a tract of land, and having no personal estate, bequeathed several pecuniary legacies to different persons, and "all the rest and residue of his estate, real and personal" he gave to his son John Davis, whom he appointed executor, and who, after the testator's death, entered into the land. The plaintiff having obtained a judgment against the son, the land was sold to satisfy the judgment; and the question was, whether the legacies were a charge upon the land or not?

BY THE COURT.—It is clear, that nothing is given to the residuary devisee, but what remains after payment of the legacies. These are a charge upon the testator's real estate. The money in the sheriff's hands must be first applied to the payment of these legacies, and the remainder must go to the plaintiff.

Referees accordingly were appointed to ascertain the balance due to the legatees.

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*132] *RIOUP *v.* BIXTER *et al.* (*b*)

Construction.

A retrospective statute ought to receive a strict construction.[2]

THE defence set up in this action was a tender of continental money, in 1783. As the proof respecting the date of the bills was not clear, the defendant's counsel contended, that by the act of 3d April 1781, no more could be recovered than the value of the money tendered, reduced by the scale at the time of tender; and this, whether the bills were of an early or late date. 1 Dall. Laws, 880.

SHIPPEN, Justice, in his charge to the jury, held, that the act of 1781 did not apply to this case. That it is an *ex post facto* act, and should be construed strictly; and though the legislature may have given certain powers to auditors (who seem to be a court of chancery, and can apply themselves to the conscience of the party), yet we are not to extend it further. A jury

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(*a*) Decided at Cumberland *nisi prius*.

(*b*) Tried at Berks *nisi prius*, before SHIPPEN and BRADFORD, Justices, in October 1791.

1 Barnet *v.* Washebaugh, 16 S. & R. 410.

2 A statute will not be construed to act retrospectively, unless the intent be indicated in clear and positive language. Oliphant *v.* Smith, 6 Watts 449; Mustin *v.* Vanhook, 3 Whart. 574; Neff's Appeal, 21 Penn. St. 243; Dewart *v.* Purdy, 29 Id. 113; Juniata Township, 31 Id. 301; Ihmsen *v.* Monongahela Nav. Co., 32 Id. 153; Alba Township, 35 Id. 271; Steckel's Appeal, 64 Id. 493; Philadelphia *v.* Passenger Railroad Co., 52 Id. 177; Chalker *v.* Ives, 55 Id. 81; Taylor *v.* Mitchell, 57 Id. 209; Hoch's Appeal, 72 Id. 53; People's Fire Ins. Co. *v.* Hartshorne, 84 Id. 453.

has not in all respects the powers of these auditors; and in the case of *reduced* payments, though auditors are restricted, yet courts and general referees have always gone on the general justice of the case. It would be a hard construction to carry it beyond the words.

Verdict for the plaintiff.

FOXCRAFT and GALLOWAY *v.* NAGLE.

Interest.

Interest does not run, during a state of war, between subjects of the belligerent powers.

THIS was an action of debt, and issue was joined on the plea of payment. It appeared, that the defendant had paid the principal and all the interest, except for seven years and a half, which he now contended ought to be deducted, as the plaintiffs were British subjects, and not resident within the American lines during the war.

The *defendant's* counsel insisted, that the point had been fully settled in the case of *Osborn* v. *Mifflin's Executors;* and also, in that of *Hoare* v. *Allen* (*ante*, p. 102). But the *plaintiff's* counsel endeavored to distinguish this case, by proving that the parties had an intercourse: that Galloway was with the enemy, while they were in Philadelphia, and that Nagle, the defendant, then lived within three miles of the city; and might have come in and gone out at pleasure. They cited the case of the *Executors of Mease* v. *Rhodes.* There, the money let out was the property of infants in Ireland, and the obligees were *described in the bond as trustees for the infants. An abatement of interest was claimed; but [*133 the court held, that as long as the person in whom the legal interest was vested, was here, the interest must run. They also urged, that the federal court had lately determined, at New Haven, that the treaty between Great Britain and America secured, by its operation, the payment of interest, during the whole war.

The *defendant's* counsel, in reply, stated it as a general rule, that whereever any one is obliged by the law, or by the creditor, to keep the money, and is not allowed to pay it, he shall pay no interest. That the clause in the treaty did not apply, and was intended merely to guard against the operation of certain acts of Maryland and Virginia, which went to the cancelling of the whole debt. It is provided, that they shall recover their just debts: but what are their just debts, is a question for the court here to determine. Now, in a war, all intercourse between enemies is forbidden. The situation of Nagle could not vary the case. Park 270–1; 2 Val. 31; 2 Mag. 257. He was out of the enemy's lines, and he was punishable, under our acts of assembly, if he went within them. In the case of *Mease* v. *Rhodes*, there was express proof, that Rhodes, during the war, promised to pay all the interest, and that put an end to the question.

BY THE COURT.—It has been frequently settled, that the debt being suspended during the war, no interest could arise upon it. Of the decision of the circuit court, we know little, having no report of it, nor any statement of facts, nor in what manner it came before the court; nor whether the counsel produced to the court the treaty; or argued the cause so fully as

ought to have been done, if it was intended to have the previous decisions reconsidered. If the plaintiffs mean to make it a point, they will have an opportunity so to do, at the return of the *postea*.[1] We are all of opinion, however, that the interest during the war should be deducted; that is for seven and a half years.

Verdict accordingly.(*a*)

Ingersoll and *Tilghman*, for the plaintiffs.
Sergeant, for the defendant.

Bond *v.* Haas's executors.

Current money.

Parol evidence not admitted, to show what was meant by current money.

This was a *scire facias* on a mortgage, dated 15th August 1777, for the payment of 250*l.* at four per cent., current *money of Pennsylvania, in one year. At the time the mortgage was executed, continental money was depreciated, and at three for one. The plaintiff insisted, that the whole sum should be paid in specie, and offered to prove that Adam Haas, in his lifetime, informed a scrivener, that the money he had received was as good to him as gold and silver; that it was so, in effect, to the plaintiff; that he was sensible that he ought to pay her specie, and desired the scrivener to draw a writing to secure it; and that Haas died soon after, before he had an opportunity of executing any instrument to secure it to the plaintiff. The defendant opposed the admission of this evidence: And—

*134]

By the Court.—This would be, in effect, altering the contract, and increasing the value of the money, in direct opposition to the act of assembly. It is settled in the case of *Lee* v. *Biddis*,(*b*) that such evidence shall not be received. The evidence stated, is not to explain the contract, but to prove a new and a different one: and if such an offer as is mentioned created any legal obligation, a different suit must be brought to enforce it. The witness, therefore, must be rejected.

The plaintiff, thereupon, suffered a nonsuit.

Ingraham, indorsee, *v.* Gibbs *et al.*

Bills of exchange.

If the drawer of a bill refuse to accept, and the payee return the first of the set to the drawer, the second cannot be subsequently indorsed over, so as to give a right of action thereon, to one who receives it, with notice.

This was an action brought on two bills of exchange; and upon the trial, the following facts appeared:—The defendants were the consignees of

(*a*) See Vattel, lib. 4, c. 2, §§ 22, 23.
(*b*) 1 Dall. 135. But see, likewise, Hollingsworth v. Ogle; Id. 267.

[1] See *post*, p. 150.

Cornelius Schenkhouse, of Amsterdam, who had sent a considerable quantity of goods to them, to be sold on his own risk and account, with orders "to remit the proceeds in good bills of exchange, or in merchandise, as they should think best." The consignment being sold, and the defendants having remittances to make on account of other agencies, purchased a bill from Bassé & Soyer (a commercial house of Philadelphia, at that time in perfect credit), drawn on Van Breinien & Sons, of Amsterdam, for 7500 guilders, which they transmitted to R. H. Portener, their correspondent at that place, and appropriated the amount in the following manner:

	Guild.	Stiv.
To Portener	2190	16
" Wondenburg	510	10
" Vandergoon	250	
" Schenkhouse	1544	10
The defendants, being the balance	3000	

*At the same time, the defendants transmitted to each of their correspondents, separate sets of bills, drawn on Portener, for the sums [*135 respectively due to them, to be accepted and paid when Bassé & Soyer's bill was paid. That bill, however, which still remained in the hands of Portener, was protested for non-acceptance and non-payment; and of course, the other bills, that depended on it, shared the same fate. Schenkhouse then returned the first bill of his set, and the protest for non-payment, to the defendants, desiring them to give him credit for the amount, and to make a remittance on account of the goods sold; but this the defendants refused, because they alleged that Bassé & Soyer's bill had been *bonâ fide* purchased by them, as authorised factors for Schenkhouse and others; and that those interested in the bill must suffer the damages resulting from its non-payment, according to their respective proportions. Upon this, Schenkhouse indorsed and sent the second bill of his set, together with a protest for non-acceptance, upon the second bill, to the plaintiff, who, it was admitted, was the agent of Schenkhouse, and that the indorsement was made merely for the purpose of bringing this action. Another action was likewise depending against the defendants, in the name of Schenkhouse, to recover the balance due on the consignment account.

After a defence on the merits, *Dallas*, for the defendant, stated, that the present action was not maintainable in point of law; and moved for a nonsuit, on this ground, that the first bill and protest for non-payment being returned to the defendants, the second bill could not afterwards be negotiated. He contended, that, abstracted from the question by whom the loss should be borne, it was sufficient to destroy all remedy on the bill itself, that Schenkhouse had refused to accept it in payment; denied credit for the amount; and expressly resorted to the original account for the goods. Besides, it will admit of some doubt, whether an action can be maintained on a protest for non-acceptance. Esp. 47; Marius 64, 73; 1 H. Black. 89.

Ingersoll and *Coxe*, replied to the motion for a nonsuit, that no authority could be shown to prove that a second bill may not be negotiated, though the first has been delivered up. In this case, the bill was only sent to the

defendants, as it might have been to any other person, with a desire that credit might be given for it; but if the credit was not given, the bill ought to have been returned to Schenkhouse; and the drawer's wrongfully withholding it, can never be allowed to destroy its obligation. As to the doubt, whether the action is maintainable on a protest for non-acceptance, Doug. 55, will effectually remove it; and we do not claim damages under the act of assembly (1 Dall. Laws, 23), but only the principal and interest.

*136] *By the Court.—The objection is, in our opinion, fatal to the action. The act of Schenkhouse, in redelivering the bill to the drawer, and desiring a remittance for the goods, must operate as a legal extinguishment of the bill. It was sent by the defendants as payment; Schenkhouse refused to receive it in that light; and accordingly, returned it to the drawer. From that moment, the bill was, in effect, cancelled; and Schenkhouse could not afterwards negotiate the second bill, so as to subject the defendants to an action upon it. The remedy of the real plaintiff, must, therefore, be founded on the original contract; and as we understand that an action in that form is now depending, the principal point of the controversy may be decided in that, without any expense or inconvenience.

On this opinion, the plaintiff suffered a nonsuit.(*a*)

JANUARY TERM, 1792.

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*137] *Hood's executors *v.* Nesbit *et al.*[1]

Barratry.—Deviation.

A mere deviation, without fraudulent intent, does not amount to barratry.

This was an action (tried at the sittings in Philadelphia in Nov. last) brought on a policy of insurance on the ship America, commanded by Captain W. Keeler, from Philadelphia, to, at and from Fayal, against the de-

(*a*) Schenkhouse *v.* Gibbs *et al.*, the action referred to in the report, was afterwards tried, in January term 1794, before the judges of the supreme court; and the only question agitated was, whether the defendants were liable for the amount of the bill remitted to the plaintiff, under the circumstances above stated?

Coxe and *Ingersoll* insisted, that the defendants, by mingling the interest of Schenkhouse with the interest of others, so as to deprive him of the possession and immediate remedy on Bassé & Soyer's bill, had rendered themselves liable for the loss that had happened, notwithstanding the general authority given to them, to make remittances in good bills of exchange 1 Atk. 172, 234; Bull. N. P. 42–3; Cowp. 480, 227–8; 10 Mod. 109.

Rawle and *Dallas* contended, that the defendants had acted *bonâ fide*, within the spirit of their authority; and had done for Schenkhouse precisely as they did for themselves. Nothing more ought to be exacted from a factor than reasonable vigilance and strict fidelity. It is usual, that there should be one factor for several merchants; and if the vendee of all their goods fail, they must bear the loss. 10 Mod. 109; Molloy 493, 494; Cowp. 479, 496; Vin. Abr. 7; Price *v.* Ralston, *ante*, p. 60. Portener would always be regarded as a trustee for the parties, according to their proportions, and Schenkhouse might make him account.

The court left the cause to the jury, who found a verdict for the defendants.

[1] s. c. 1 Yeates 114.

fendants, as underwriters. The jury found a special verdict; which, after stating the policy, the defendants' subscription, and the arrival of the ship at Fayal, on the 23d December 1785, proceeded thus: "And the said jurors further say, that about three weeks after the said William Keeler had so arrived at Fayal, in the said ship, he the said William Keeler, at the request of a certain Captain Barnes, on the suggestion of Duncan Ross, did, with and on board the said ship America, sail from the said island, in quest and pursuit of a certain sloop called the Fly, whereof the said Barnes was master; which said sloop had been run away with by the seamen belonging to her: and that the said William Keeler did return from the said pursuit, in the said ship, within eight days after she had sailed from Fayal aforesaid; and that the said ship afterwards, on the 31st of January 1786, was, by storm and tempest, wrecked upon the island of Fayal and totally lost. And the jurors further find, that the said W. Keeler, by his agreement with the said Captain Barnes, was to have received as a compensation for his services, in going with the ship America aforesaid, in pursuit of the said sloop, the sum of 100*l.* sterling; and that in going from the island of Fayal aforesaid, he had no view of, and did not intend, any exclusive profit or advantage to himself; but did intend that the benefit and advantage to be derived therefrom, should be for the owners of the said ship and himself. And whether the law be for the plaintiffs, &c., they submit, &c."

The cause was argued by *Lewis* and *Sergeant*, for the plaintiffs, and by *Wilcocks* and *Ingersoll*, for the defendants.

The *plaintiffs* contended, that the departure from the course of the voyage amounted to barratry, and could not be considered as a mere deviation. As the consent of the owners is not stated, it cannot be presumed, and in many of the cases, the want of consent is relied on as a principal ingredient in barratry. It is not necessary there should be a direct evil intention: *lata culpa et crassa negligentia* will amount to a barratry. Park 95. Barratry is neglect *of duty. Every wilful and inexcusable departure is a [*138 gross breach of duty, and amounts to barratry. Ibid. 93. It is said, he intended to benefit his owners as well as himself; but to construe this as an excuse, would be productive of fraud. The master may easily pretend great zeal for his owner's interests, and yet sacrifice them to promote his own. In the definition given by Park, it is said, p. 94, it must be "tending to his own benefit:" This does not mean *exclusive* benefit. The master runs no risk himself, by going out, but he might get 50*l.* by it; while he hazarded his owner's insurance, the mere premium of which was almost equal to the price he was to get, for giving chase to the Fly. The words of Park, p. 94, are "If it is for the benefit of his owners, *and not for his own benefit*, it is no barratry." But here, the departure was with a view to his own private advantage. He sacrifices the policy, wages, provisions and the safety of the ship, for a paltry expectation of private gain. A mere error might excuse; but here it is very different, and if the principle be established, there will be no security for owners. The cases put in the books, show that the principle contended for by the defendants is not sound. Deserting a ship is barratry. Park 93. "So, when the master of a ship defrauds the owners, by carrying the ship a different course." Post. Dict. His interest is out of the question. So, sailing out of port without payment of the duties, is barratry, though the master gains nothing by it: And Justice

Buller seemed to think (Park 103, 63) that breach of an embargo (though perhaps done with a view to the owner's interest) was barratry. But when he has his own gain in view, the case is stronger; nothing but pure intentions can purge the act: And in *Vallejo* v. *Wheeler*, Cowp. 143, stress is laid on the circumstance, that the master was acting for his own benefit.

On the part of the *defendant*, it was urged, that here was a plain deviation stated, and unless the departure was *clearly* an act of barratry, judgment must be for the defendant. They said, that in all the cases respecting barratry, some circumstances of fraud, gross negligence, or evil and criminal conduct towards the owners, were stated. 1 T. R. 323. It must be more than deviation; it must be something criminal. Park 93; 1 Post. Dict. 136, 214; Cowp. 154. All define it to be a trick, fraud or cheat upon the owners. The definition, in Park 94, is a good one; and we contend it must be for the exclusive benefit of the master to make it barratry. There is no case which hints, that the master may not connect his own interest with that of the owners. In *Stammers* v. *Brown*, 2 Str. 1173, it must be something of a criminal nature, as well as a breach of contract. If he mistook *honestly*, the owners must bear the loss. The want of consent on the part of the insured is not sufficient of itself: so is Park 335. The owners abide by all the misconduct of the master, but such *as imports fraud. There are some inaccurate expressions in the books, as that of "wilful deviation;" but they must mean criminal or fraudulent deviation.

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The opinion of the court was delivered, on the 10th of January.

McKean, Chief Justice, after stating the material facts, said—This is either a deviation or a barratry. The nature of barratry seems now pretty well understood, and we think there ought to appear fraud in the master's conduct, before it is considered as barratry. Barratry is a criminal act towards his owners, or an act done solely for his benefit, without the consent of the owners. We do not discover, in this case, any marks of criminal misbehavior, and the judgment must be for the defendants.

Shippen, Justice.—It is a mere imprudence of the master, and for that the owners alone are answerable.

Yeates, Justice, concurred, but gave no separate opinion.

Bradford, Justice.—As this is a mercantile question and divided a very respectable jury, I think it right, to state my opinion pretty much at large.

The special verdict states a voluntary departure from the due course of the voyage, without any necessity or just cause. This will, therefore, discharge the policy, unless the circumstances attending it, prove it to be (as the plaintiffs contend it is) an act of barratry. Before I take notice of those circumstances, it will be proper to ascertain what is meant by barratry. It has been often defined, and its general meaning seems now as well fixed, as that of any other term known in the law. From comparing these definitions, it appears, that the terms "villainy, knavery, cheat, malversation, trick, deceit, or fraud of the master," are used as synonymous with it. The adjudged cases, from that of *Knight* v. *Cambridge* (7 Mod. 230; 2 Ld. Raym. 1349), in 1724, down to that of *Nutt* v. *Bourdieu* (1 T. R. 323), in 1786, speak the same language. There is no case of barratry, in which we may not perceive some fraud or criminal conduct in the master. Sailing out of port, without

payment of duties, is not an exception : this is said to be neglect, but it is more ; it is evidently a fraudulent and criminal act, exposing the ship to forfeiture, for the dishonest purpose of putting money in his own pocket. (*Vallejo* v. *Wheeler*, Cowp. 152.) Sometimes, indeed, it is difficult to distinguish the lower species of fraud, from the higher degrees of mere misconduct. But one thing is clear, if the facts are not strong enough to import some fraud or criminal conduct in the master, whatever name we may find to his conduct, we cannot call it barratry.

The question then is, "do the facts found by the special verdict, fix any fraud or criminal conduct on Captain Keeler." *If they do, it must be, either because the departure was without his owner's knowledge, [*140 or because it was made with a view to his own private benefit. It was not much urged at the bar, that every deviation without orders, amounted to barratry ; yet, as this was the very point, upon which I have reason to think the jury divided in opinion, I will notice it. It is true, that in many of the commercial cities of Europe, a deviation without the owner's consent will not discharge the insurers. It is so established in France,(*a*) Amsterdam,(*b*) Middleburg,(*c*) and Rotterdam.(*d*) But this is the operation of positive ordinances. No such regulation is known among us. On the contrary, Lord Mansfield lays down the rule in (*Pelly* v. *Royal Exchange Assurance Co.*) 1 Burr. 347, in these words : "If the voyage is altered, or the chance varied, by the fault of the insured, *or of the master*, the owner ceases to be liable." Park, in p. 336, is clear, that "it makes no difference whether the insured were or were not consenting to the deviation." If the term *insured* is thought equivocal, Wesket is more express, and in p. 165 says, "it makes no difference whether the *owner of the ship*, or the proprietor of the goods, were or were not privy to the deviation." In *Elton* v. *Brogden* (2 Str. 1264), the deviation was against the express and positive orders of the owners, yet it was not barratry. Cases might be multiplied ; but the point will not bear further comment.

But the master's intention was relied on by both parties. It was admitted, that if the master had deviated, with a view to his private advantage alone, and without intending any benefit to his owners, it would have been barratry. The law is so, and the reason is plain : such conduct imports fraud on the face of it. It is a cheat upon the owners, and *secretly* putting in his pocket, what belongs to them. On the other hand, it was agreed, that if it had been for the exclusive benefit of his owners, it would not have been barratry: And why not? Because it is impossible to impute fraud to such disinterested conduct. The case before us is a middle case between the two I have mentioned. The master did intend the profit he might have gained, should be for the benefit of his owners and himself ; and while the defendants urge, that his attention to his owner's benefit renders it a mere deviation, the plaintiffs contend, that the private views poison the whole transaction, and make it barratry. Inconveniences appear to result from either construction, and I think it would be mischievous, to give the master's conduct, from this circumstance alone, a definite name. It does not, *of itself*, sufficiently import either fraud or fairness, to acquit or condemn the transaction. Cases may be put, where an attention to his own interest may not

(*a*) 2 Magens 174. (*b*) 2 Mag. (*c*) Id. 78. (*d*) Id. 91.

be inconsistent with the general purity of the master's views. *Such was the case in *Elton* v. *Brogden*. On the other hand, the master may unite a small interest of his owner's, with a greater one of his own, yet we may discover a dishonest heart, regardless of their essential interests. In every case, therefore, of this kind, we must weigh every circumstance, and form our judgment from the impression of fraud, or fairness, which the whole transaction makes on our minds.

Taking into view the whole conduct of Keeler, I cannot discover any fraud or criminal conduct. Here was an act of piracy committed in open day: the pursuit of the Fly was, in itself, a meritorious action; and if Keeler had been the owner of the America, he would have been applauded for it. The whole mercantile world seems interested in the suppression of such villainy. He is solicited to employ his vessel on the occasion; he stipulates for a compensation; and though he expected to receive a part of it himself, yet that must have depended on the pleasure of his owners. It would have been *their* money, earned by *their* ship; yet the master might honestly expect, that they would approve his conduct and reward his exertions. It was a sudden thing; we cannot say that he knew of this insurance, or that he was aware of the consequences of his deviation. Here are no marks of knavery, nor even of a disregard to his owner's interests. It was an imprudence; and he is answerable for it to his owners; but the insurers are discharged.

For these reasons, I concur with the rest of the court, that judgment must be for the defendant.

Caton, assignee of the sheriff, *v.* McCarty.[1]

Practice.—Bail.

The filing of a declaration is not a waiver of special bail.

Levy had obtained a rule to show cause why the proceedings on the bail-bond should not be stayed, on the ground, that the plaintiff had accepted the defendant's appearance, by filing a declaration in the original action. This he contended was a waiver of bail, and cited Highm. 153, 157; Lilly Pr. Reg. 86; Barnes, 257; Rich. Prac. 132; Poph. 145.

Heatley, in reply, urged, that the English practice had never been extended here; and if it was, the declaration ought to have been *delivered*, before it could have had effect. 2 Term Rep. 112; 1 Cromp. 94; Impey Prac. 94; Rule B. R. 23, 24.

By the Court.—It has been the practice in Pennsylvania, to file declarations, before appearance. In the case of summons, the act requires that it should be filed —— days before the return-day. It has never yet been determined, that the filing a declaration is a waiver of bail. We have no such rule; *142] and unless *some substantial benefit is to be derived from adopting the practice contended for, the court will not alter the usual course.

Rule discharged.

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[1] s. c. 1 Yeates 103.

JACKSON *v.* VANDERSPREIGLE'S executor.[1]

Bequest of movables.

Where, after several legacies, a testatrix gave all her "wearing-apparel, furniture," &c., "and every *movable* whatever," to A., and bequeathed the residue of her estate to B., and it appeared, that the estate consisted chiefly of bonds, and that the testatrix's original intention was, to give wearing-apparel only to A., it was *held*, that the word "movables" must be taken in its usual and common acceptance; and that it did not embrace the *choses in action*.

THIS was an action brought to recover the amount of a bond, in favor of the testatrix, which the executor had received. The plaintiff claimed it as a legacy, under the following words in the will: "Item, I give and bequeath unto Mary Jackson, wife of William Jackson, all my wearing-apparel, household furniture, plate, linen, books, and *every movable whatever*." The testatrix then proceeded to give a variety of legacies in cash, and bequeathed the rest and residue of the estate to Samuel Robison and others. Her personal estate was about 2000*l.*, principally out at interest; but she had no real estate.

Rawle, for the plaintiff, urged, that the words were broad enough to cover the debts due to the testatrix. He referred to 12 Co. p. 1; 1 Atk. 171, 177, 180; 4 Mod. 156; 1 Ves. 369, 173; Co. 33 *b;* 1 P. Wms. 267; Brown 127; and without reading the authorities, desired that the point might be reserved: But—

BY THE COURT.—We have no doubt at present. The meaning of the testatrix is plain enough. If the plaintiff's construction were right, all the rest of the will would be destroyed. In this case, movables must be confined to things of the same nature with those before specified. Let there be a verdict for the defendant, with liberty for the plaintiff to move for a new trial, if, on consideration, he think his position tenable.

Verdict for the defendant.

MERCIER *v.* MERCIER.

Warrant of attorney.

A rule on the plaintiff's attorney, to file his warrant, must be moved for, before plea pleaded.

THIS cause stood on the list for trial. *Du Ponceau* moved for a rule on the plaintiff to file his warrant of attorney. But—

BY THE COURT.—It has been often ruled, that this application must be made, before plea pleaded.

Rule refused.

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[1] s. c. 1 Yeates 101.

*Nesbit v. Pope.

Practice.

The entry of a continuance, by mistake, which is immediately discovered, and notice given, does not prevent the party from insisting on a rule for trial or *non pros.*

The defendant had, at a former term, obtained a rule to try, or *non pros.* At this term, the defendant's counsel, not recollecting this, desired the plaintiff to continue the cause, which he agreed to, and the prothonotary entered a continuance accordingly: but, immediately after, discovering that he had a rule on the plaintiff, the defendant acquainted the opposite counsel with it, and gave notice that he should insist upon the rule. This day, the cause was called, and the defendant moved that it might be ordered on: the plaintiff objected; and insisted, that the entry of the continuance was conclusive.

By the Court.—Such an entry cannot be conclusive. This a mere mistake; and as it was immediately discovered, and notice given, no inconvenience arose from it. If the plaintiff had suffered anything by it, it might have been another matter: but here he could suffer nothing. If he was ready for trial, when the entry was made, he must be ready, when the mistake was notified to him.

Jones, *qui tam*, v. Ross.

Amendment.—Commission.

A declaration in a *qui tam* action is amendable.
On the execution of a commission, a paper intended to be given in evidence, must be proved before the commissioners, on oath.

This cause was set down for trial. *Ingersoll*, for the plaintiff, moved for liberty to amend the declaration, and stated it as a settled practice, even in *qui tam* actions.

The Chief Justice said, if you amend, the defendants will be entitled to an imparlance and costs.

Moylan, for the defendant. We cannot oppose the amendment, but we ask no imparlance. The plaintiff may amend at the bar, and we will go on to trial immediately.

Rule accordingly.

Same Cause.

In order to prove certain passengers, imported by the defendant into the state, to be convicts, and to have undergone punishment in the Spiel-House of Hamburg, in Germany, a commission to examine witnesses in that city had been taken out. This was returned by the commissioners, containing a written report of the names of the persons confined in the Spiel-House, in 1786, and of the offences for which they had been convicted, *certified *144] by a clerk of the chancery, to have been signed by the late directors of the Spiel-House, in his presence, and that of the commissioners. The return was objected to, and—

By the Court.—This is not a good execution of the commission; the

testimony is not taken under oath. And as to the paper being evidence in itself, it is not an official paper, certified by the proper officers, who had, at that time, the custody of the Spiel-House, or of the books. They style themselves the *late* directors. This paper, therefore, is not admissible as evidence.

GORGERAT *et al.* *v.* MCCARTY.[1]

Bills of exchange.

In a suit by payee against acceptor, the possession of the bill is not evidence of payment to a subsequent indorsee: it must be proved on the *aliunde*.

THIS was an action brought by the indorsers, the payees, against the acceptor of a bill of exchange, which was drawn in France, and had been several times indorsed. And judgment was confessed by the defendant, subject to the opinion of the court—whether possession of the bill and protest, was sufficient evidence, without further proof, that the plaintiffs had paid the subsequent indorsee? Or was *primâ facie* evidence of such payment, sufficient, unless contrary evidence was produced, on the part of the defendant? The cause was argued on the 15th September 1791, by *Rawle* and *Du Ponceau*, for the plaintiffs, and by *Ingersoll* for the defendant.

For the *plaintiffs*, it was urged, that upon general principles, the possession of the bill and protest, in this country, as well as in England, is sufficient evidence of the property; that the bill, however, was a French bill, and in France, the possession would be deemed conclusive (Ordon. Louis XIV., act. 11); and that the objection was too late, after a judgment confessed, when the matter must be treated as if before a jury of inquiry. Lovelass, 154, 278. In mercantile cases, a greater latitude of evidence is always admitted, than in cases of any other description. Thus, the protest of a bill is sufficient proof of a demand of payment. If, indeed, the possession of a foreign bill is not regarded as the best evidence of the plaintiff's property, the resulting inconveniences to commerce would be injurious in the highest degree. Commissions must issue in every action on a bill of exchange, to establish payments in every different place, in which the different indorsees may chance to reside. It is true, that there is no authoritative precedent; for the case in Ld. Raym. 742, is a mere loose note, made on the report of a few merchants, and the decision (which clearly proves too much, if anything, to wit, that the receipt ought to be on the protest) may have been given under circumstances of suspicion; but the *universal silence on the subject, strengthens the principle that arises from the spirit of commercial negotiation, and [*145 public convenience. The defendant's contract is to pay the amount of the bill to the payee, or any subsequent indorsee. There is internal evidence in the bill itself, that it had passed into the hands of the different indorsees; and therefore, the plaintiffs recovering the possession, affords a strong presumption of their having paid a valuable consideration for it; and fraud ought not to be inferred. The original parties to a bill are the drawer and payee; but an indorser engages in the transaction, perhaps, without their knowledge or consent; and consequently, less evidence should be required

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[1] s. c. 1 Yeates 94.

from the payee, than from the indorser. But the possession of the bill and protest is evidence of an authority to demand its contents. *Morris* v. *Foreman*, 1 Dall. 193. It is *primâ facie* evidence of property; and, as such, must be conclusive, until it is contradicted. 5 Burr. 2688.

For the *defendant*, it was answered, that in this action the declaration must state, that the plaintiffs had paid the indorsee, nor would the omission to do so, be cured by a verdict. Doug. 617. If it is material to allege the fact, it must be material to prove it ; and the general rule is, that the party must produce the best evidence in his power. The possession of the bill and protest is merely presumptive ; and from the very nature of the transaction, better proof must be in the power of the party. Even the acknowledgment of the obligor will not be received to prove his own bond ; the attesting witnesses must be examined. In Ld. Raym. 742, the case occurred ; and it was there decided, that possession of the bill and protest was not sufficient, without producing a receipt from the subsequent indorsee; and this rule not only remains uncontradicted, but is recognised in Lovelass 177, where the author describes the proof to be given in an action like the present. With respect to the argument arising from the place where the bill was drawn, it is enough to observe, that though the *lex loci* may regulate the nature of the *contract*, it cannot prescribe the nature of the evidence to be produced in our courts in support of it.

The Judges now (January 1792) delivered their opinions *seriatim*, as follows :

Bradford, Justice.—This is an action brought against the acceptor of a bill of exchange, which had been several times specially indorsed, and the plaintiffs are the first of those indorsers. At the trial, the plaintiffs gave no direct proof of payment to the last indorsee, insisting that possession of the bill and protest was sufficient, or at least *primâ facie* evidence of it. Whether it be so, or not, is the point in question.

*146] It seems to be fully settled, in *Death* v. *Servonters*, Lutw. 885, *that by a special indorsement of a bill of exchange, the indorser parts with his right, and discharges the acceptor as to any payment to him ; and that he can regain his property only by taking up the bill, and making payment to the last indorsee. The same doctrine is laid down in *Brunetti* v. *Lewin*, reported in Carthew 130, and afterwards, on error, in Lutw. 896, where it is held, " that if the bill has been specially indorsed by the plaintiff, he cannot recover, unless, at the trial, there be evidence of payment to the last indorsee." This payment, therefore, is a material part of the plaintiffs' case. They state it as such, in their declaration, and rightly ; for it is clear, from the case of *Brunetti* v. *Lewin*, that if it were not stated, the omission would be fatal. Carth. 130. Being a material fact, it must be proved.

The plaintiffs do not appear to deny this ; but they contend, that possession of the bill is *primâ facie* evidence of property in it. This is the case with bills payable to bearer, and sometimes, when the bill is payable to order. But among bills payable to order, there is a familiar distinction between those which are specially indorsed, and those which are indorsed in blank. Possession of the latter is evidence of title ; and Ld. Mansfield assigns the reason in *Peacock* v. *Rhodes*, 2 Doug. 611. " Bills indorsed in

blank," says he, "are considered as bills payable to bearer: both pass by *delivery:* and possession proves property in both cases." But bills specially indorsed do not pass by delivery; and therefore, possession does not prove property in them. The last indorsee may transfer his right, either by indorsement, or by accepting payment from the indorser. If the first had been the case, and the present plaintiffs had claimed as his *indorsees*, it is clear, they must have proved his handwriting. Possession would have been no evidence of *that:* Why, then, should it be evidence of payment? The one is as material as the other, and it is as easy to prove a receipt, as to prove an indorsement.

But the case of *Mendez* v. *Carreroon*, Ld. Raym. 743, if it be law, goes the whole length of determining this question. It was doubted at the bar; but I agree with the rest of the court, that there is no ground to suspect its authority. It is neither denied, nor doubted, nor is its principle shaken, in any subsequent cases. On the contrary, it has all the support we can reasonably expect, that of being handed to us, in our abridgments and elementary treatises, as established law.(*a*)

If this case needed any confirmation, it strikes me that the same principle is to be discovered in *Clark* v. *Pigot*, reported in *Salk. 126, and 12 Mod. 192. There, the plaintiff, who was the payee, had indorsed the [*147 bill, and afterwards brought this action against the acceptor. It was objected, that the plaintiff's right had been transferred by the indorsement; and that he could not maintain the action; but the court held, that the indorsement, being *in blank*, did not necessarily import a transfer; and they add "but if the blank had been filled up, the indorsee *alone* could have maintained the action." (12 Mod. 193.) This at once distinguishes a special from a general indorsement; and proves that the possession of a bill, specially indorsed, is no evidence of a right to its contents.

But the plaintiffs rely on the case of *Morris* v. *Foreman* (1 Dall. 193), determined in this court, where it is said, the court held, that "the possession of a bill of exchange is evidence of an authority to demand its contents." This is but a short note of the case, without any state of facts; and seems to me more extensive than the principle of the case will warrant. I have examined the record, and inquired into the facts of that cause, and that the decision may be understood, I will state them. It was an action between the original parties, brought by the payee against the drawer, upon a bill drawn under a particular agreement respecting the damages in case of a protest. Morris remitted this bill to London, on his own account, to his correspondents, Clifford & Tysot, who had no interest whatever in its contents; but with this indorsement: "Pay to the order of Clifford & Tysot." The bill being protested, this action was brought; and the indorsement appearing on the bill and protest, the defendant moved for a nonsuit, insisting that the action could be brought only by the indorsee; but the court held, that the action was maintainable, in the name of the plaintiff. Under all the circumstances before them, the court doubtless considered the indorsement as a mere authority to receive the money for the plaintiff's use, and not as a transfer of the interest. In this view, it is no more than what was ruled, long ago, in *Dehers* v. *Harriot*, 1 Show. 154. There, the plaintiff

(*a*) 4 Vin. 265; Cun. Bill. Ex.; Dig. of Cas. K. B.; Law. Dict.; Lovelass; Kidd.

had indorsed the bill as follows: "Pray pay to D., value on my account." And it was objected, that the plaintiff's interest was transferred by the indorsement. But it being *proved*, that D. had no interest in the moneys; and the indorsement being "on the plaintiff's account," it was held, that no interest passed, and the action was sustained. In strictness, perhaps, it ought to appear on the *face of the indorsement* (*Edie* v. *East India Co.* 2 Burr. 1227), whether it was intended as a transfer, or an authority; but be this as it may, the principle which governed in the case of *Morris* v. *Foreman*, does not in any degree interfere with the present decision.

*148] *The inconveniences which might result from establishing so strict a rule of evidence, were strongly urged, and struck me forcibly on the argument; but on a close inspection, they will disappear, or be found to be balanced by opposite advantages. The payee may avoid them, if he will, by a *general* indorsement, which is now the most common, and is said to be the most proper one. The difficulty suggested, of tracing payment to the several indorsees, may be avoided by a general receipt of the last indorsee, on the protest.

Besides, it is a real benefit to the mercantile world, that bills may be thus restrained. It is a desirable security against accidents and fraud; even bank-bills, generally payable to bearer, are framed in this manner, for distant remittances. Being made payable to order, and specially indorsed, the payment can be to no one but the indorsee. If the acceptor pays a bill, specially indorsed, to any but the indorsee, it is clear, from the case cited by Judge Yeates,[1] as also from Doug. 617, that he must pay it over again. To admit that possession is any evidence of right in this case, would be to make all bills, in effect, bills payable to bearer—would multiply losses, and increase the temptations to theft.

Upon the whole, I am fully satisfied, that as the plaintiffs gave no evidence of payment to the last indorsee, they were not entitled to a verdict, and that judgment must be entered as in case of a nonsuit.

YEATES, Justice, concurred, and delivered his reasons at large.[2]

SHIPPEN, Justice.—I also concur. I acknowledge that, on the argument, I thought differently, from an apprehension that the course of mercantile negotiations might be obstructed; but on considering the case immediately after the term, I was fully satisfied, that both on principle and by law, the mere holding a bill of exchange, cannot entitle an intermediate indorsee to call upon the acceptor for payment.

Upon *principle*, it cannot be; because, when a man indorses an accepted bill, he parts with all his right to the indorsee, for a valuable consideration, and, as to him, the acceptor is discharged; the right of calling upon the acceptor can never be regained, but by taking up the bill, from the last indorsee, and paying him the money. Some evidence of this payment must be necessary; otherwise, one who finds, or steals, the bill, might sue the acceptor, and he would be answerable again to the last indorsee, who never having received satisfaction would surely recover from the acceptor. The usage, on inquiring, I find to be now, what it appears to have been in Lord Holt's time, that when the last indorsee receives the money from an inter-

[1] Cheap v. Harley, cited 3 T. R. 127.

[2] For Judge YEATES' opinion, see 1 Yeates 96.

mediate indorsee, he *gives a receipt upon the protest, which always accompanies the bill, and shows who has the legal and equitable right to sue the acceptor.

The case of *Mendez* v. *Carreroon*, in Ld. Raym. 742, does not stand alone: in 1 Lutw. 888, the same principle appears in an adjudged case, upon a writ of error. The court say, that when the payee has once indorsed the bill, the acceptor is entirely discharged as to him, unless he becomes again entitled to receive the money, by an actual payment to the indorsee. Some later cases have the same aspect, and no case appears to the contrary.

McKean, Chief Justice, after recapitulating the facts, and authorities, proceeded in the following words:—

The acceptor of a bill of exchange is only liable to the last indorsee; for, all the prior indorsers have parted with their interest in it, are presumed to have received a valuable consideration for it, and can, therefore, have no right to the money a second time. But if the last indorsee protests the bill for non-payment, and afterwards receives back the money from a prior indorser, such indorser acquires a new title to receive the money from the acceptor, by such payment: so that, at the time this action was commenced, the defendant was liable to no person but the last indorsee, or to the prior indorser, who had paid him. This is by the custom of merchants, as appears in the case of *Death* v. *Servonters*, Lutw. 888, and *Lewin* v. *Brunetti*, Ibid. 896. The plaintiffs have accordingly alleged, that they paid the subsequent indorsee, but offered no proof of it, except to produce the bills and protests. This is not sufficient; they should have produced a receipt from the last indorsee, or some witness, or evidence of payment. The usual evidence in such case is a receipt at the foot of the protest. *Mendez* v. *Carreroon*, 1 Ld. Raym. 742. In that case, the merchants, who had been sworn respecting the custom, were of opinion, that this was the *only* evidence; but we think with Lord Holt, that if payment be any way proved, it is sufficient. If the defendant should pay the plaintiff the amount of the bills, and the last indorsee should hereafter sue him, what can prevent him from recovering the money? The defendant cannot prove that he had been paid by the plaintiff, who may have come into possession of the bills by trover, bailment for a special purpose, or by fraud. Why was the action not brought in the name of the last indorsee? If it had, the holding of the bills might have raised a presumption, that the plaintiffs were *agents* for him. The case in Ld. Raym. is in point: there, the plaintiff not only had possession of the bill, but he had been sued by the subsequent indorsee, and a judgment was against him. What might be admitted as *primâ facie* evidence *in other cases, will [*150 not do in such a case as this, since the custom among merchants is opposed to it, as appears from all the writers and collectors of cases, from the report by Ld. Raym. until the present time. There is a case referred to, in 3 Term Rep. 127, which also confirms this doctrine.

Let judgment be entered for the defendant, as in case of a nonsuit.

FOXCRAFT *v.* NAGLE.[1]

New trial.

Under the rules of the supreme court, notice in writing must be given of an intended motion for a new trial.

WITHIN the four first days of the term, *Ingersoll* and *Tilghman* moved for a new trial, on the point of a misdirection of the judge. *Sergeant* objected to the rule, no notice in writing of the intended motion having been given, as is required by the rules of the court. The counsel for the *plaintiff* then urged, that the point they wished to agitate was left open by the court, and reserved for argument *in banc;* at least, that they understood it so, and that they did not consider notice as necessary, where a liberty of moving the point was reserved in the presence of the parties at *nisi prius.* But at any rate, the mistake was a sufficient ground to dispense with the strictness of the rule. In 4 Burr. 2271, the mistake of the attorney induced the court to dispense with the four day rule. *Sergeant.*—In the rule of the K. B., there is a provision that such a motion may be made, after the four days, "on special leave being asked and obtained."

BY THE COURT.—There was no point reserved on the trial of this cause. The court had no doubt in their minds; but as it was a great national question, we should have had no objection to a more solemn argument. We, therefore, told the jury, that if the plaintiff's counsel desired to have the question reconsidered, they would have an opportunity of moving it at the return of the *postea.* This motion is directly in the face of the rule, and cannot be sustained.

Rule refused.

CLAYTON'S Lessee *v.* ALSHOUSE.

Ejectment.

If a landlord mean to take defence, he ought to make himself a party to the record; otherwise he is not entitled to notice.

THIS cause was carried down for trial, at the last *nisi prius,* in Northumberland county; but the defendant refusing to confess lease, entry and ouster, the plaintiff was nonsuited.

*151] * *Wilcocks* now moved to set aside the nonsuit, and to permit the cause to be tried, on an affidavit of Evan Owen, in which it was set forth, that the deponent was, in fact, landlord of the premises in dispute, and conducted the defence; that he had no notice of the trial; that he had been obliged to attend the argument of another cause, at Philadelphia, about the same time; and that he did not previously know of the holding of a court of *nisi prius,* in Northumberland. But—

BY THE COURT.—Notice of trial was given to the defendant in the cause; and the nonsuit has been regularly entered. It was not necessary to give notice to Evan Owen: for, wherever a landlord means to take defence, he ought to make himself a party on the record.

The rule refused.

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[1] s. c. 1 Yeates 103. For a former report of this case, see *ante,* p. 132.

MARCH TERM, 1792.

BARR *v.* CRAIG. (*a*)

Assumpsit for money had and received.

Assumpsit **for money had and received is an equitable action; under the general issue, the defendant may go into all the equity of the case; and if he may, in good conscience, retain the money in his hands, there can be no recovery.**

THE circumstances of this case were as follows: Henry Banks, of Virginia, wishing to remit a sum of money to James Barr, the plaintiff, requested the defendant (then in Virginia, and to whom Banks was also indebted, in partnership with Preeson Boudoin) to take a charge of an order for 800*l.* on Mease & Caldwell, of Philadelphia, upon the terms specified in the subjoined receipt, which the defendant gave upon the occasion.

"Received, Richmond, 21st January 1783, of Henry Banks an order of Daniel Clarke, Esq., on Mease & Caldwell, for the sum of 800*l.* Virginia currency, on an insurance policy of the schooner General Wayne; which I promise to return him in ten weeks, or to account with Preeson Boudoin, for one half, and James Barr, of Philadelphia, for the other.

(Signed) JAMES CRAIG, Sen'r."

By virtue of this order, the defendant, on the 4th of June 1784, received 771*l.* 7*s.* 0*d.*; and the present action was brought *to recover one-half of that sum, with interest, as money had and received to the use of the plaintiff. But, besides a general count for that purpose, the declaration contained a special count, setting forth the particulars of the case, the order, and the receipt of the money. It likewise appeared, that the plaintiff having sued Henry Banks, Standish Forde became his bail, and as a means of indemnifying Forde, Banks deposited with him a certificate for $8000. In relation to that action, an agreement was afterwards made, on the 24th of October 1789, between Philip Barber, the attorney in fact of Henry Banks (who had also an assignment), and the plaintiff, to this effect—"that judgment should be entered in favor of the plaintiff, for the whole amount of the debt; but that he should only receive 500*l.*; that he should thereupon discharge Forde from his obligation as bail; and as to the residue of his demand, he should wait the issue of a suit against the defendant, Craig, and divide whatever might be recovered from him, with P. Barber, Banks's attorney." This agreement was made, after Barr's attorney had discovered, that the cause of action was a joint debt due to James and Robert Barr, though the action was instituted in the name of James Barr only. But judgment was, accordingly, confessed, in April term 1790, for the whole sum claimed by Barr, to wit, 1355*l.* 17*s.* 8*d.*; a *ca. sa.* thereupon issued; and Forde the special bail, having then sold the certificate deposited with him by Banks, paid the full amount of the judgment with interest and costs, to the sheriff, reserving the balance to answer some other claim [*152

(*a*) At *nisi prius*, before the Chief Justice, Shippen and Bradford, Justices.

against Banks; the sheriff, on the 31st of July 1792, paid it over to the plaintiff, Barr; but Barr, on the same day, after deducting 500*l.*, paid the balance, 887*l.* 15*s.* 2*d.*, to P. Barber, in compliance with the terms of the agreement on which the judgment had been confessed. It further appeared, that Banks & Boudoin were indebted to Craig, in a sum exceeding the amount received under the order upon Mease & Caldwell; and that in September term 1788, Craig had issued a foreign attachment against Banks & Boudoin, which was served upon Forde, as garnishee; and in which judgment had been obtained, but no *scire facias* had issued.

The cause was tried, on the general issue, at the Nisi Prius, in March 1792, before the CHIEF JUSTICE, SHIPPEN, and BRADFORD, Justices; when *M. Levy* and *Ingersoll* argued for the plaintiff; *Randolph* and *Lewis*, for the defendant.

The *defence* rested on three propositions: 1st. That Henry Banks was to be considered as the person really entitled to receive the money: 2d. That the defendant had a right to retain it in satisfaction of the judgment on the foreign attachment: and 3d. That the action was not supported by the evidence; *inasmuch as the only proof of the plaintiff's interest *153] is the receipt given by the defendant for the order on Mease & Caldwell, which is not actually set forth in the special court; and, affording an action of a higher nature, is no evidence on the general count for money had and received. Bull. N. P. 145, 131. Nor could any person bring this action, who was not a party to the *assumpsit*. Esp. 105; Cro. Eliz. 369.

The *plaintiff's* counsel, on the other hand, contended, 1st. That the money received by Craig, was the money of Barr; and the moment it was received, it was held in trust for Barr's use: to retain it, is contrary to Craig's own promise, and to the principles of equity; and a promise to account, is tantamount to a promise to pay. 1 Esp. 23; 1 Str. 264, 626. 2d. That a partnership debt cannot be set off against a separate debt; and, therefore, as Craig was the creditor of Banks & Boudoin, he could not discount his demand from the separate property of Banks; which was the present case. 3d. That there was nothing collusive or fraudulent between Banks and Barr, in relation to the judgment. The latter, finding that his action was erroneously instituted, was obliged to make use of some address, even to secure immediate payment of a part of an honest debt; but the right and the remedy for the balance were clearly left open. 4th. That the action is well brought, and ought to be sustained. Yelv. 23–4; 1 Vent. 318, 332; Bull. 133; Doug. 139; Cowp. 443; 2 Bl. Rep. 1269; Ld. Raym. 303.(*a*)

The CHIEF JUSTICE delivered the following charge to the jury, after stating the evidence on both sides of the cause.

McKEAN, Chief Justice.—The plaintiff had, unquestionably, a good cause of action, at the time of instituting his suit: But, it appears that, at that time also, the defendant had a good cause of action against Henry Banks; and accordingly, attached certain moneys belonging to Banks, in the

(*a*) BY THE COURT—The form of the action need not be labored by the plaintiff's counsel.

hands of Forde, who was the special bail of Banks, in another action, brought against him by James Barr, the present plaintiff. Judgment being entered, and a *ca. sa.* issued in this last-mentioned action, the bail became liable for the debt; and accordingly, we find, that Forde paid the amount, with costs, to the sheriff; who paid it over to the plaintiff, and took a receipt in full. This, then, appears to be complete satisfaction; and the plaintiff apparently ought never to recover more even from Banks; unless, perhaps, the costs accrued in the action now trying, before the payment by Forde in the other action; as in the case of several suits against the maker and indorsers of the same promissory note.

But after such proceedings, what reasonable ground can be alleged, why Barr should recover the money in question from Craig, to whom [*154 Banks was justly indebted? It is said, that the arrangement permitted Barr to take no more than 500*l.* out of the deposit in Forde's hands: but surely, the act of Barr cannot prejudice the right of Craig; and Craig, by virtue of the foreign attachment, was entitled to all the property belonging to Banks in Forde's hands, beyond what was necessary to satisfy the judgment for which Forde was bound, and his own *bonâ fide* claim. Craig had a lien upon the whole money: it was, in effect, his own. Since, therefore, Barr took the whole amount out of Forde's hands, by virtue of his judgment, and so discharged Forde from his obligation as garnishee in Craig's foreign attachment, it is consonant with every principle of law and equity, that the receipt of Barr should avail Craig, as a full discharge from the present demand. Either Barr received all the money for himself, or he did not: in the former case, this action cannot be supported; and in the latter, he has withdrawn, under color of his judgment, a portion of Craig's funds, for which he must be answerable in an independent suit; or the amount may be set off against the present demand. I impute no fraud to the plaintiff; but his secret agreement with Barber, however honest, cannot affect the defendant. It appears, indeed, that four creditors were striving, with legal vigilance, to obtain a legal advantage; and the only question is, who has succeeded? In the opinion of the court, the plaintiff must, on this occasion, be considered as having received the whole debt that was due to him from Banks; and the original consideration of the debt, on account of which the order was given, is extinguished in the judgment.

Bradford, Justice.—If the plaintiff recovers, I think it must be upon the count for money had and received: and it appears to me, that the plaintiff had a good cause of action, at the commencement of the suit. He received this money, under an engagement to apply it to the payment of the debt due to Barr. He was merely a trustee: and while the debt was unsatisfied, the interest continued. But, I conceive, that as soon as Barr's demand is extinguished, the trust ceases: and in such a case, Barr, in his own name and for his own use, has no longer a demand on this money. This is an equitable action; the defendant, under the general issue, may go into all the equity of the case; and unless it appears, that he cannot in conscience and equity retain the money, unless, *ex æquo et bono*, he is bound to refund it; the verdict must be for him. Considering that Banks is insolvent, and that he is indebted to Craig, I cannot say, that it would be unconscionable to retain this money, after Barr's debt is satisfied.

*Now, it appears; that all Barr's demands against Banks were liquidated, and included in the judgment confessed in 1790; that judgment is satisfied, and it is legally discharged on record: the whole amount of the debt and costs was actually paid into Barr's hands.

But it is said, this judgment was, by a previous agreement, to operate in Barr's favor, to the amount of no more than 500*l.*; the balance was paid to Banks's attorney; and therefore, Banks is still indebted to Barr. This may be true between the parties; but how does it operate as between Forde and Craig? For the law will not suffer Barr to give this transaction one operation upon Craig, as to himself; and another as to Forde. Here, the money in Forde's hands was attached, and judgment obtained. If Craig proceeds against Forde, the garnishee, Forde will show the judgment at Barr's suit, and that he was legally compelled to pay above 1400*l.*, by virtue of that proceeding. This will be an answer to Craig's demand. And why? Because it is a payment and a discharge of a regular judgment. Now, if the garnishee can hold up this to Craig, as a real satisfaction and payment of a just debt, Craig can hold it up as such to Barr. No man will be allowed to blow hot and cold. If Barr received this money on account of his judgment, he had a right so to do; but then his debt is extinguished. If he did not receive it on this account, then he had no right to it at all—887*l.*, on which Craig had a lien, was wrongfully received; and Craig may consider it as money received to his use, and set it off in this action. Suppose, Craig had sued Barr for this 887*l.*, how could he defend himself? By insisting that there was a *bonâ fide* debt due from Banks; and that he received it in payment and discharge of the judgment. Then, in this action, he shall not be allowed to deny, what he must affirm in that. If only 500*l.* had been all that was due to Barr, and yet, for the purpose of protecting the money from the attachment, a judgment for 1300*l.* had been confessed and the money received, I think Craig could have recovered it from Barr; and yet, has the case, as the plaintiff represents, this very aspect. Here is an action, in which judgment could never have been recovered; judgment is confessed for 1300*l.*; though 500*l.* is really to be paid to Barr, the residue is withdrawn from Craig, and paid to Banks. Upon the whole, the plaintiff is reduced to this dilemma: either it is a full payment and discharge of his debt; or he has unconscionably received 887*l.*, on which Craig had a lien, and for which he is accountable to him. In the first case, his cause of action is extinguished; in *the latter, Craig's demand against Barr, exceeds Barr's demand against him. In either case, the defendant ought to have a verdict.

*156]

Verdict for the defendant.

Duffield *v.* Stille.[1]

Mesne profits.

The plaintiff in ejectment, after a recovery, may maintain an action for mesne profits, though he has parted with his title, by deed of bargain and sale, with special warranty.

This was an action for mesne profits, after a recovery in ejectment. It appeared, that subsequently to that recovery, the plaintiff had conveyed

[1] s. c. 1 Yeates 154.

the fee-simple of the premises to the defendant, in the usual manner, by deed of bargain and sale, with a special warranty. And two questions were made for the opinion of the Court—1st. Whether, after the conveyance in fee-simple, the plaintiff could maintain this action? 2d. Whether the deed was not, in law, a release of the mesne profits?

For the defendant were cited, Freem. 365; Bro. Ass. 62, §§ 369, 359; 8 Co. 154 *a*; Litt. 508. But—

By the Court.—The case is clearly with the plaintiff. Let there be—

Judgment accordingly.(*a*)

Wenn *v.* Adams.[1]

Practice.

On a rule for trial or *non-pros.*, the plaintiff cannot object, that he has not filed his declaration.

This was an action of *assumpsit*, brought in the year 1791. The defendant pleaded *non assumpsit*, issue was thereupon joined; and in January 1792, the defendant obtained a rule for trial or *non pros.*, with notice at bar.

Heatley now moved that the rule be made absolute. But *Morris*, for the defendant, urged, that as no declaration had been filed, the cause was not at issue, according to the directions of the act of 1766. But—

By the Court.—The declaration must certainly be filed before trial: And when the plaintiff accepts a plea, it is an engagement that this shall be done; and a waiver by the defendant of any advantage from the omission. If the objection had any weight, it ought to have been made, when the rule was obtained at the last term; as the plaintiff then submitted to the rule, he shall not now elude its operation.

Judgment of nonsuit.

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*Austin *v.* Snow's Lessee.[2] [*157

Reference.

An ejectment may be referred, by consent; and in such case, it is not necessary that the referees should find damages or costs.

In Error.—An action of ejectment being referred, the referees found for the plaintiff, with costs, but without damages.

On arguing the case, *Lewis* contended, that this was bad, damages being essential to the award of costs. It is so, even in ejectment, at this day. 3 Bl. Com. 400; Sayer, Law Costs, 4; 2 Str. 1051. He also urged, that the judgment was entire, and could not be reversed as to the costs, and confirmed as to the residue.

Ingersoll said, that costs might be given, where damages were recoverable; and although they are not given (Law of Eject. 365); and that judg-

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(*a*) Bradford, Justice.—Having been counsel for the plaintiff, I give no opinion in the decision of the cause.

[1] s. c. 1 Yeates 156. [2] s. c. 1 Yeates 156.

ment might be affirmed for part, and reversed for part. 2 L. Raym. 893; 4 Id. 1534; 11 Co. 56. Besides, this was a reference, where niceties were dispensed with. It is assigning that for error, which is for the plaintiff's advantage.

By the Court.—We are here upon a point of practice. The usage of referring ejectments, as well as accounts, is very ancient; and it has been the constant usage to confirm awards, although no damages or costs are found. It would shake many judgments, were niceties to prevail.

Judgment affirmed.

Stewart *et al.* v. Ross.[1]

Commission.

Where both parties join in a commission, the commissioners on both sides attend, and the plaintiffs are present at the taking of the depositions, they cannot object that the witnesses have not answered all the interrogatories.

A commission was issued, on the part of the defendant, and various interrogatories filed, designed to be put to different witnesses. The return of the commission was signed by all the commissioners; and it appeared, that the plaintiff was present at the taking of the depositions; but, to certain of the interrogatories, no answers were returned by some of the witnesses, and those which were answered by one witness, were not answered by others. The plaintiff objected to the reading the commission: But—

By the Court.—Had the execution of this commission been *ex parte*, it would not only have been informal, but substantially exceptionable. As it is returned, however, by the commissioners on the part of the plaintiff, as well as by those on the part of the defendant, it is to be presumed, that the witnesses knew nothing about the subject-matter of the interrogatories, *158] to which no answer is returned. At any rate, it is a waiver *of the right which the plaintiff had to the answer of the witness; and on that ground, we hold the evidence admissible.

Bank of North America *v.* McKnight.[2]

Notice of non-payment.

If due notice of the non-payment of a promissory note be not given, an indorser is discharged.

The defendant was sued, as indorser of a promissory note drawn by S. Sidman, on the 10th February 1785, payable in forty-five days. Notice was given to Sidman, on the day it became due, and to McKnight, four or five days after; which the defendant now contended was too late.

By McKean, Chief Justice (the other judges declining to give any opinion, on account of their interest in the bank).—Before the revolution, it was not usual to give notice to the indorser, or even to call on the maker, as soon as a note became due; it would have been considered as harsh and unreasonable. But since the establishment of the bank, a rule has been intro-

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[1] s. c. 1 Yeates 148. [2] s. c. 1 Yeates 145.

duced; and as these notes, lodged in the bank, were often accommodation notes, it was highly reasonable, that notice should be given in a *short* time. What that time ought to be, has not been determined. Two or three months would certainly be too long, and a day may be too short. I would not *singly* lay down a rule, but leave it to the jury as a question of fact. They must, therefore, judge for themselves, taking into consideration the usual practice at that time. (*a*)

Verdict for the plaintiff.

STEWART *v.* BIDDOCK.

Judgment in error.

IN ERROR. *Detinet* for Connecticut money. On report of referees, finding a certain sum in Connecticut money due to the plaintiff, judgment was entered for the value in Pennsylvania money. The judgment was reversed by consent; and *Lewis* urged, that the court here could give the same judgment that the court below had given. But, on considering the authorities, he abandoned the point.

RALSTON, assignee, *v.* BELL.[1]

Bankruptcy.—Lien of judgment.

The state bankrupt law did not operate upon lands which the bankrupt had previously aliened.
In 1792, the lien of a judgment in the supreme court, on a removal from the common pleas, was co-extensive with the state.

IN 1785, a judgment was obtained in the supreme court, in a cause removed from Philadelphia common pleas, against *Charles Hamilton, who, in 1789, was declared to have become bankrupt, and by verdict [*159 was found to be so, from the 12th February 1788. There was a reference under the judgment. A report was made on the 27th November 1788, and confirmed. A *test. fi. fa.* was afterwards issued to Lancaster county, and levied on certain lands, which had been sold by Hamilton, subsequently to the judgment, but before his bankruptcy. On this case, two questions arose: First, whether these lands could be affected by the judgment and execution issued after the bankruptcy? Second, whether a judgment in the supreme court, in a cause removed from Philadelphia county common pleas, binds lands in Lancaster county?

It was urged, that this was a dispute between two contending creditors, both of them having a lien, before the act of bankruptcy. The bankruptcy, therefore, cannot affect their rights. The act only says, that a judgment shall be no lien against the rest of the creditors, so as to affect *them;* and operates only where the claim is by the general creditors. The case in 1 P. Wms. 737, goes on this ground: "That the legal estate never was vested in the purchaser, but in the assignees of the bankrupt, and therefore, the chancellor ordered the money unpaid to be paid into their hands." The case

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(*a*) See Robertson *v.* Vogle, 1 Dall. 252.

[1] s. c. 1 Yeates 183.

cited then is in point. This is not the estate of Charles Hamilton that our execution is levied on: the opinion of Justice SHIPPEN, in 1 Dall. 371, is full to this point.

As to second point, the powers of the supreme court are the same as those of the king's bench, and the lien is commensurate with its jurisdiction. 1 Lilly Ab. 509; Cro. Jac. 246. It has been the general understanding, that judgment in the supreme court, in a cause removed, bound land in all the counties of the state.

On the other side, it was said, that as the judgment was not executed before the bankruptcy, the judgment-creditor had no right to come against the purchaser. If it had not been for this purchaser, it is clear, he must have come in with the rest of the creditors; and it is not reasonable, that he should defeat the purchase, to benefit himself. So that his claim is both under, and in opposition to, the purchase. The distinction taken between legal and equitable estates cannot be the principle of the case in P. Wms.; for the consequence of that would be, that he who has the legal estate would be in a worse situation, than he who has only the equitable estate.

It was also said, that the analogy between the court of king's bench and the supreme court, was not perfect. This is a judgment in a cause *removed*, which can only be tried in the county from whence it is removed, and the whole purpose of removing is to bring the cause before other judges, and not to enlarge the effect of the judgment. This is illustrated by the fiction *160] which authorized the issuing a *test. fi. fa.* Besides, no case is produced to show, that if a *cause be removed from an *inferior* court in England, into the king's bench, the judgment will bind generally.

THE COURT thought, that the first point had been fully decided, in the two cases cited by the counsel for the plaintiff, from P. Wms. and Dallas's reports. The second they held under consideration, in order to inquire, what had been the practice in other counties; and being satisfied in that respect, in September term, they were all of opinion, that a judgment in the supreme court, in a cause removed thither from any inferior court, was a lien on all the lands which the defendant had in the state.(*a*)

Having been of counsel in this cause, Justice BRADFORD gave no opinion.

(*a*) Mr. Hale Graham, an eminent conveyancer, held, that these judgments in the supreme court did not bind lands generally; and it has not been usual for persons living in the country, to apply to the prothonotary of this court for lists of judgments; which Mr. Bird, on being asked by the court, confirmed.[1]

[1] See act 20th March 1799, § 14; 3 Sm. Laws 358.

APRIL TERM, 1792.

Ross *et al.*, executors, *v.* Rittenhouse.[1]

Admiralty.—Judges.—Bond.

Jurisdiction in cases of prize, and of everything incidental and consequential thereto, is in the admiralty.
No action will lie against a judge, for an act done in his judicial capacity.
Non-payment at the day, is a forfeiture of a counter-bond.

In this cause, a verdict was taken for the plaintiff, subject to the opinion of the court on a case stated. After argument, the judges recapitulated the facts and arguments of counsel, and delivered their opinions *seriatim*, in the following terms:

McKean, Chief Justice.—This case is, in brief, as follows: The British sloop Active had been captured as prize, on the high seas, in September 1778, and was brought into the port of Philadelphia, where she was libelled in the court of admiralty of the state, held before George Ross, Esq., the then judge, on the 18th day of the same month. The four persons for whose use this action is brought, claimed the whole vessel and cargo, as their exclusive prize; but Thomas Huston, master of the brig Convention, a vessel of war belonging to the state of Pennsylvania, claimed a moiety for the State, himself and crew; and James Josiah, master of the sloop Gerard, a private vessel of war, claimed for himself, owners and *crew, a fourth part, [*161 allowing a fourth for the four persons before named. All the claimants were citizens of the United States. The libels were tried by a jury, on the 15th of November 1778, and a general verdict given, in the proportions above mentioned, which was confirmed by the sentence of the court.

Gideon Olmstead and the other three persons, were American mariners on board the Active; they had risen upon the master, and confined him and the other mariners in the cabin, where a contest was kept up for the command of the vessel. The Convention and Gerard came up with her, and the question was, whether the four American mariners had subdued the rest of the crew, before these vessels came in sight; that is, whether hostilities had then ceased? The jury were of opinion, they had not, and gave the verdict accordingly.

Gideon Olmstead and the three other mariners appealed from the sentence to the court of appeals of the United States, which, on the 15th of December following, reversed the sentence of the judge of the admiralty, and decreed the whole to the appellants. The judge refused obedience to the decree of reversal, and paid a moiety of the net proceeds of the prize into the treasury of the state, taking a bond of indemnity from the defendant in this action, as treasurer of the state; upon which bond, this action is brought. The executors of Judge Ross, the obligee, having been previously sued in the court of common pleas for the county of Lancaster, in this state, for the

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[1] s. c. 1 Yeates 443.

money so paid, and judgment being obtained against them by *default*, without any knowledge of the defendant:[1] thereupon, several questions have been made, which may be stated as follows:

1st. Had the court of appeals jurisdiction to investigate facts, after a trial and general verdict by a jury, and to give a contrary decision, without the intervention of another jury?

2d. Had the court of common pleas of Lancaster county jurisdiction in the action by Olmstead and others, against the executors of the judge; or should not the decree of the court of appeals have been carried into execution by that court, or the court of admiralty, without the aid or interference of any common-law court?

3d. Can an action be maintained on this bond, the condition whereof is virtually to disobey the court of appeals, and the laws of the land, if that court had of right a power to decide contrary to the general verdict of a jury? And can the plaintiffs, without having defended, or given notice to the present defendant, of the suit in the court of common pleas, support an action on this bond?

I conceive it proper to premise, that I took notice, at the time this action was first brought to trial in this court, "that when *the business was *162] before the court of appeals of the United States, in December 1778, I had the honor to be President of that court; but declined sitting, on account of my connection with this state as Chief Justice, and otherwise; and that the same reason still subsisted. That the next thing to giving a righteous judgment, was to endeavor to give general satisfaction; which circumstance might not probably be attained by our decision of the present controversy, both court and jury being in some measure interested, as they were all citizens of Pennsylvania. For these reasons, I expressed a wish, that some mode might be adopted for trying the cause in the supreme court of the United States." This proposition was then assented to, and a juror withdrawn; but, it seems, our expectations have been disappointed, and we are obliged, at last, to decide the controversy.

To determine the first question, we must take into consideration the act of congress for erecting tribunals competent to determine the propriety of captures, passed the 25th November 1775, the fourth section of which is in these words:

"That it be and hereby is recommended to the several legislatures in the United Colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made aforesaid, and to provide, that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient." The sixth section provides; "that in *all* cases, an appeal shall be allowed to the congress, or to such person or persons as they shall appoint for the trial of appeals, &c."

The act of general assembly, passed the 9th of September 1778, entitled "an act for establishing a court of admiralty," allows appeals from that court, in all cases, unless from the determination or finding of the facts by the jury, which was to be without re-examination or appeal.

[1] For a further history of this case, see Olmstead's Case, Bright. Rep. 9; and United States v Bright, Ibid. 19 note.

The congress, on the 15th of January 1780, resolved (*inter alia*) "that the trials in the court of appeals be according to the usage of nations, *and not by jury*." This has been the practice in most nations, but the law of nations, or of nature and reason, is, in arbitrary states, enforced by the royal power, in others, by the municipal law of the country; which latter may, I conceive, facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered. Now, why may not a fact, respecting the capture from an enemy by citizens of the same state, and in which question no foreign nation or person is concerned, be determined by a jury, as well as in other cases? This mode of ascertaining a fact done on the high seas, to wit, who were the captors of a prize, when *the contending parties are all citizens or subjects of the same country, seems to be as reasonable, as in disputes about property acquired [*163 on land. I confess, I do not see how the law of nations is counteracted or infringed by it.

In England, if piracy was committed by a subject, it was held a species of treason, being contrary to his allegiance by the ancient common law; if by an alien, it was held to be felony. Formerly, it was cognisable by the admiralty courts, which proceed by the rules of the civil law; but the statute 28 *Hen. VIII.*, *c.* 15, established a new jurisdiction for this purpose, which proceeds according to the course of the common law. Here is a precedent of an act of parliament, changing the common mode of trial in Europe and introducing the trial by jury, which remains in force and practice to this day. If this can be done, where life is the stake, *à fortiori*, it may be done in matters of *meum et tuum*.

It, then, appearing to me, that the congress and legislature of Pennsylvania, had power and authority to make the alteration in the mode of trial of facts litigated between citizens, it remains to be inquired, whether the verdict in the present case was capable of re-examination by the court of appeal, without another jury. The genius and spirit of the common law of England, which is law in Pennsylvania, will not suffer a sentence or judgment of the lowest court, founded on a general verdict, to be controlled or reversed by the highest jurisdiction; unless for error in matter of law, apparent upon the face of the record. 3 Black. Com. 330, 379; 1 Wils. 55. This is enforced by the act of assembly of the 9th of September 1778, in clear and express words, in the very case under consideration; which act was passed in compliance with the act of congress of the 25th November 1775, and allows an appeal in all cases, unless from a verdict of a jury; having a reference to the subject-matter, and meaning that the facts should not be re-examined or appealed from; but that an appeal might be made, notwithstanding, with respect to any error in matter of law. The advantage of *vivâ voce* evidence over written, in the investigation of truth, will hardly be controverted at this day in the United States; and the court of appeals had not the opportunity of seeing the witnesses on the trial, or of so well knowing the credit due to them, respectively, as the jury.

For these reasons, and others which I shall omit for the sake of brevity, I am sorry to be obliged to say, that, in my judgment, the decree of the committee of appeals was contrary to the provisions of the act of congress and of the general assembly, extra-judicial, erroneous and void. I am strengthened in this opinion, by the true construction of the resolve of congress of

the 15th January 1780, to wit, that the trials in the *new court of appeals should be according to the usage of nations, and not by jury; which implies, that the court of appeals, prior to this, had, or ought to have, proceeded by jury-trials. *Ad questionem facti, non respondent judices, ad questionem juris, non respondent juratores.* 1 Inst. 155 *b.*

As my opinion on the first question is in favor of the defendant, it will appear unnecessary to say anything to the other points; but as they have been strongly insisted upon, I shall briefly notice one of them. It rather seems to me, that the appellants had no other way of obtaining the execution of the decree in their favor, but by the aid of the court of appeals, or of admiralty, and no court of common law has any jurisdiction in the case. Douglas 572; 3 Term Rep. 344; 4 Ibid. 382, 400; 1 Dall. 221; 1 Wils. 211. And also, that an action will not lie against a judge, for what he does as such. Cro. Eliz. 80, 397; 1 Mod. 184, 185; 2 Ibid. 218; 12 Ibid. 388, 391; 1 Ld. Raym. 465; 2 Ibid. 767; Salk. 397.

Shippen, Justice.—This is a suit brought on an obligation from the defendant to the plaintiff's testator, for the sum of 22,000*l.*, on a special condition for the repayment and restitution of the sum of 11,496*l.* 9*s.* 9*d.*, paid by the said George Ross, the judge of the state court of admiralty, to the defendant, treasurer of the state of Pennsylvania, as the share and dividend of the said state, in and out of the prize sloop Active, according to the verdict of the jury, on the trial of the same sloop, in the admiralty court of the said state, *in case* the said George Ross should thereafter, in due course of law, be compelled to pay the same, according to the decree of the court of appeals, in the case of the said sloop Active, and for the indemnification of the said George Ross from all actions and demands, which might arise on account of his having paid the said money to the defendant.

As a foundation for the present suit, the plaintiffs produced a record of a recovery in Lancaster county against them, for the sum of 3248*l.* 4*s.* 7¼*d.*, at the suit of Gideon Olmstead, Artemus White, Aquila Rumsdale and David Clark, in an action of *assumpsit*, for money had and received by the testator, George Ross, to the use of them the said Gideon Olmstead, and others. The judgment appears to have been taken by default, and the damages assessed by a jury of inquiry.

It is stated in the case, that the defendant had no notice of this recovery, until after the final judgment. It, therefore, seems to have been agreed, that whatever defence the defendant might have made, if he had been privy to that action, he may avail himself of in this. Two principal questions arise in the case.

1st. Whether the court of appeals or congress were competent to decide the question of prize, and the consequent question, who were the captors to whom the prize should be adjudged, *contrary to the verdict of the jury, in the state court of admiralty? *165]

2d. Was the action of Olmstead and others, against the judge of the admiralty, for the money lodged in his court, in consequence of his own decree, cognizable in the court of common pleas in Lancaster county?

As to the first question, I own, I am not convinced, that the sovereign power of the nation, vested by the joint and common consent of the people

and states of the Union, with the exclusive rights of war and peace, and with the consequent and necessary powers of judging in the last resort of the legality on captures on the ocean, can, either in reason or sound law, be precluded from deciding an appeal, both of facts and law, arising in cases of prize, merely because they had recommended to the states to pass laws to establish courts of admiralty, for the trial of prize causes, in which the facts were, in the first instance, to be tried by jury, according to the course of the common law. 1st. Because, in the nature of things, and according to the course and practice of all civil law courts, all decisions in the courts in the last resort, *upon appeals*, are made upon a view and full consideration of both fact and law. 2d. Because, otherwise, appeals from the inferior courts would, in most cases, be vain and nugatory. 3d. Because, otherwise, no steady and uniform rules of decision could be established, and foreign nations could never know, or confide in, the grounds of our decisions; and it does not appear to me material, that, in the present instance, all the parties were American citizens. And lastly, because, in the present case, congress has explicitly reserved the power of final decisions upon appeal in all cases.

As to the second question, whether an action is sustainable in the court of common pleas, in behalf of Olmstead and others, against the judge of the admiralty, for the money he distributed according to his own decree, I acknowledge, I cannot discover any principle or authority in law, upon which such an action can be supported. It is not now to be made a question, whether the courts of admiralty have not an exclusive jurisdiction over all questions of prize or no prize; and also who are the captors of prizes, and how distribution shall be made; together with the power of enforcing their own decrees: the cases of *Lindo* v. *Rodney*, *Le Caux* v. *Eden*, and *Camden* v. *Home*, fully settle the point. The jurisdiction of the admiralty seems, likewise, to be *exclusive* in many cases, where the question of prize seems to be at rest; as, where the admiralty has decided that a ship taken is no prize, *ex. gratia*, in the case of a neutral vessel. In that case, it is not competent for a common-law court to sustain a suit for the illegal capture, but a new libel is exhibited in the admiralty, to compel the captors to account to the captured. 4 T. R. 385. *So, in the case of *Le Caux* v. *Eden*, an action for false imprisonment would not lie at common law, where the imprisonment was merely in consequence of taking a ship as prize, although the ship had been acquitted. I know of but one case, where the common-law courts have sustained suits for money paid out of the court of admiralty, in consequence of a taking as prize; and that is, where the admiralty has fully liquidated all demands relating to the proceeds of a prize, and the money remains in the hands of the agents of the captors. In such cases, actions at law have been supported against the agents; but it must be ascertained, that these are the agents of the real captors; for if anything is left for the admiralty to settle, as if other persons, not represented by the agents, claim any part of the proceeds, there the courts of law will not interfere. And this was the case of *Camden* v. *Home*, 4 T. R. 382. [*166

What is the case before us? A judge of an inferior court of admiralty condemns a prize, declares who are the captors, and orders a distribution accordingly. On appeal to the supreme court of admiralty, that court re-

verses his judgment, and directs a different distribution. The judge below refuses to obey the sentence, and persists in distributing the proceeds of the prize agreeable to his own decree. A suit is brought here, to compel the judge to perform the decree of the superior court. Was the case or question of prize at rest? or was there not something now to be done by the superior court to enforce the sentence? Can ours be a proper court to decide between the sentences of two contending courts of admiralty, or to enforce the sentence of either? It is in vain to say, the times were such, that the supreme court could not, or would not, proceed to extremities with the judge of the inferior court. We are not authorised to aid a defective or unwilling jurisdiction, by assuming an extraordinary power, unknown to the law. Can a judge, in the execution of his own judgment, although contrary to that of a superior court, be considered as in the situation of an agent receiving the money of his constituents? Or, if, by any strained construction, he could be called the agent of those in whose favor he decrees, can he be sued as the agent of those against whom he decrees? In whatever light I view this question, I am satisfied, that the court of common pleas was incompetent to carry into effect the decree of the reversal of the superior court of appeals, and that an action for money had and received, against the judge who distributed the money according to his own decree, could not be sustained in a court of law.

YEATES, Justice.—On the statement of facts in this case, three points have occurred.

1st. Whether the court of appeals of the United States had jurisdiction in the case of the sloop Active?

*167] *2d. Whether the court of common pleas at Lancaster, had jurisdiction in the action by Gideon Olmstead and others, against the now plaintiffs?

3d. Whether the plaintiffs are damnified so as to warrant the present proceedings, under all the circumstances of the case? I will consider the different points, inversely.

On the 3d point, I am satisfied by the authorities cited by the plaintiffs' counsel, that there is sufficient proof of a damnification, to warrant the suit in a common case. The non-payment of money at the day, is a forfeiture of a counter-bond. 1 Vent. 261; Cro. Eliz. 672. Putting the obligee in danger of being arrested, is a damnification. 3 Bulst. 233; 5 Co. 25; Cro. Jac. 340.

It was admitted, indeed, on the last argument, that the proceedings at Lancaster should be considered as evidence of a damnification; but that the defendant should be let into a full defence in this action. No notice having been given to this defendant of the institution of the suit against the now plaintiff, he is not estopped from saying, that they were not bound in the former action, to pay the money.

On the second point, it has been insisted by the defendant's counsel, that the courts of admiralty having exclusive jurisdiction in cases of prize and their consequences, the common pleas of Lancaster could have had no cognisance of the action commenced by Gideon Olmstead and others.

In the famous case of *Le Caux* v. *Eden*, WILLES, Justice, says: "Where the injury is the necessary and natural consequence of the capture, the court

of admiralty has the sole and exclusive jurisdiction." Doug. 579. ASHURST, Justice, observes; "where the admiralty has jurisdiction of the original matter, it ought also to have jurisdiction of everything necessarily incidental." Id. 580. BULLER, Justice, in a very elaborate argument, infers from all the adjudged cases, "that the admiralty has a jurisdiction on the question of prize or not prize, and its consequences, and that the common-law courts have none." Id. 587, 590. And in *Smart* v. *Wolff*, the words of Judge BULLER are, "Every case that I know on the subject, is a clear authority to show, that questions of prize and their consequences are solely and exclusively of the admiralty jurisdiction." 3 T. R. 344.

In *Lord Camden et al.* v. *Home*, it is adjudged, that the prize courts, and courts of commissioners of appeal, have the sole and exclusive jurisdiction of the question of prize and no prize, and who are the captors. 4 T. R. 382.

In *Doane's administratrix* v. *Penhallow*, and at 1 Dall. 221, Mr. President expresses himself thus: In this cause, "the validity *of the sentence of the court of appeals is disputed. If we say, it is valid, we, in [*168 effect, say, the brigantine is no prize; if otherwise, we say she was a prize. We have clearly no authority to say either the one or the other." And again, "this is an action to carry into execution the sentence of the court of appeals, which we have no authority to do, that being the proper judicature to carry into effect its own sentences."

These adjudications militate strongly against the jurisdiction of the court of common pleas of Lancaster county. The cause of action there, was "the immediate and necessary consequence of the vessel's being taken as a prize." 1 Dall. 221. It was, in short, a demand instituted by the plaintiffs, as sole captors of the sloop Active.

But it has been contended by the plaintiffs' counsel, that here all parties affirm the same thing, to wit, that the sloop was a prize, and *that* question cannot now possibly arise; which is said to distinguish it from the several cases cited. And for this purpose, *Henderson* v. *Clarkson*, determined in this court (*post*, p. 174) is quoted; where the court held, that an agent for seamen might recover, at common law, the prize-money due under the decree of the court of admiralty of Pennsylvania.

I find from my notes, that the circumstances were as follows: The plaintiff was appointed agent for forty-three seamen on board the privateer brig Holker, to receive their prize-money. The defendant was marshal of the court of admiralty of Pennsylvania, where two of the prizes were libelled, condemned and sold. The plaintiff, on the 27th December 1781, gave a bond to the commonwealth in 250*l.* penalty, conditioned to account faithfully with the seamen, and to pay over the shares unclaimed, within one year, to the use of the corporation of Contributors to the Pennsylvania Hospital. The judge of the admiralty, on that day also, issued a writ to the defendants, to deliver over the goods and money due to the owners and seamen, or their agents, on the different prizes; to which he made return, that the goods and money were ready to be delivered over. That suit was brought to recover the prize-money due to the plaintiff's constituents. The marshal had paid a considerable part, and rendered his account, but some of the items therein were disputed. The court, on full argument, resolved, that the agent might, as a common head or centre for the captors and hospital, under the right acquired by the acts of assembly of the 8th March, and 22d September

1780, institute a suit in his own name, as the captors themselves might have done; and as the question respecting "prize or no prize" could not come into controversy, he might recover the money due to them by the admiralty decree; they having a vested interest therein, under *the acts of congress and the legislature. The marshal had returned to the judge, that he had the goods and money ready to be delivered to the captors, or their agent; and this was held to amount to a written promise to pay the same to the plaintiff, Henderson, as agent of the seamen.(a)

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The two cases are not analogous; they possess distinct prominent features: In the former case, there was no question, who were the captors, or how the booty was to be divided; there were no discordant decrees of different marine courts; no dispute respecting the constitutional powers of the judicature which pronounced the final decree. Here, they all fully exist; and a common-law court at Lancaster was called on, to carry into execution the decree of the court of appeals, against the executors of the state judge, and in derogation of the decree he had given, sanctioned by the verdict of a jury.

On the first point, it is not essentially necessary to give an opinion, whether, if the resolve of congress had been absolute and imperative, instead of being barely recommendatory, as to the establishment of courts of admiralty in the different states, and the laws of any one state had been repugnant thereto, such resolution would be supreme, and control the law of the individual state. Nor shall I attempt to define the former powers of congress, by fixing how far they reached, anterior to the confederation; which was sent to the different states for ratification on the 17th November 1777, and finally acceded to by Maryland on the 1st of March 1781. I am, however, compelled to say, that the powers of congress must necessarily be supposed to have been co-extensive with the great objects which America ther. had in view, and competent to protect and advance the united interests of the whole. It is sufficient, in my idea, for the decision of the case before us, to observe, that the present suit resting on the judgment in Lancaster county as its basis, if the then plaintiffs were not legally entitled to recover against the executors of Mr. George Ross, the action now before the court is not sustainable. 3 T. R. 377. I have only to add, that it would also have afforded me much pleasure, if this argument had been conducted before the judges of the supreme court of the United States. We formerly indulged ourselves with hopes of it, when the jury were discharged in an action between the now plaintiffs and Thomas Leaming, in January term last, when the same points came in question. We may be considered, in some remote degree, as parties in the present suit, and the decision of the federal judges would probably have given more general satisfaction. But the parties have insisted on our opinion; and we are bound *to give it. On the best consideration, therefore, that I have been able to bestow on the subject, I find myself constrained to give my voice, that judgment be rendered for the defendant.

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(a) See the case of Henderson v. Clarkson, here alluded to, *post*, p. 174. The case of Ross *et al.*, executors, v. Rittenhouse has been inserted, by mistake, of the term when it was argued, not when it was decided.

MARSHALL *v.* MONTGOMERY *et al.*

Seamen's wages.

If the master, during an embargo, undertake an intermediate voyage, which is completed, the seamen have earned their wages therefor, and are entitled to be paid, notwithstanding a subsequent capture.

THIS was an action for seamen's wages. The plaintiff shipped himself on board the defendant's ship, on a voyage from Philadelphia to Havana, from thence to Cadiz, and from Cadiz back to Philadelphia. On the ship's arrival at Havana, an embargo was laid, and the ship detained a considerable time. A plan being formed for the reduction of New Providence, a proposal was made to the American captains, and among the rest to the defendant, to accompany the Spanish troops; for which service they were to receive ten dollars and a half per ton, per month, and to be freed from the embargo. A gratuity was also to be given to the captains. The defendant, with the rest of the American captains, agreed to go, and Providence was taken; but no provisions being to be had, the ship sailed afterwards for Philadelphia, and on her way, was captured by the enemy. The wages of the seamen had been paid at the Havana, until the ship was ready to sail for Cadiz, and the embargo laid. The tonnage was paid, but lost, on the capture of the ship.

Rawle, contended, that it was clear, that seamen's wages must be paid during an embargo, and cited Park, Ins. 142; 1 Magens 68; Wesket 590; 1 Term Rep. 132, *in notis*. That the voyage to New Providence is to be considered as a new voyage, as it was not the voyage contracted for. Though a voyage be altered, wages are still due. Freight, it is true, is the mother of wages (Esp. 112–3), but freight means nothing but the earning of the vessel.

Lewis and *Tilghman* urged, that as the vessel was not entitled to freight, no wages were due: that the voyage was not a distinct one, and that the loss of the vessel put an end to the claims of the seamen.

BY THE COURT.—Here is a new voyage, commenced with the assent of the sailors. The question is, was this a new voyage to Philadelphia, with leave to touch at Providence, or was it one voyage to Providence, and another to Philadelphia. The Spanish intendant agreed to pay $10½ per ton, and they received it. The intendant calls it freight: it is certainly a compensation for the use of the vessel; it is an earning by the owners, and the whole object of this voyage was completed at New Providence. This may be considered, in the spirit of the law, as a port of delivery. With the loss, which happened afterwards, the sailors have no concern. We consider this as a *distinct contract for a voyage to the island of Providence, and that being completed, we are of opinion, that the plaintiff is entitled to his wages until that time. [*171

Verdict for the plaintiff.

FIELD, for the use of OXLEY *et al.*, *v.* BIDDLE.[1]

Parol evidence.

Parol evidence is admissible, of a contemporaneous agreement that a written contract should not be enforced according to its terms, but should be qualified in accordance with that parol agreement.[2]

THIS was an action of debt, on a bond dated the 1st of May 1786; conditioned for the payment of 1000*l.*, on or before the first of Nov. ——; and the defendant pleaded payment, with leave to give the special matter in evidence. The defence set up on the trial was, that it had been agreed by the parties, that the bond should be void, unless Oxley & Hancock, merchants residing in England, transmitted a ratification of certain articles of composition within six months: and the following testimony was given:—

1. The articles of composition, dated the 3d of May 1786, stating, that the plaintiffs have agreed with I. Collins (who was indebted above 5000*l.* sterling, to Oxley & Hancock), that Collins shall pay 1000*l.* to Oxley & Hancock, "provided that this agreement of composition shall not take effect as to a full discharge of Collins, until Oxley & Hancock shall have transmitted their ratification to America."

2d. A receipt by one of the plaintiffs, for the bond in suit, "being given in consequence of the above agreement," although dated the 1st of May 1786.

3d. A letter dated 27th December 1786, from Field, acknowledging a demand made upon him by Biddle, for the bond in question.

The defendant then offered William Bell as a witness, to prove, that at the time the bond was executed, it was agreed that it should be void, if the ratification did not arrive in six months. The testimony was objected to; but after some argument, the point was reserved, and became the subject of discussion at the present term.

Ingersoll, for the plaintiff.—The intention of the parties must be construed by the bond and the indenture. The attempt is now made to explain away or vary a written agreement; to show that to be conditional, which the writing imports to be absolute. Bac. Elem. 90; 4 Bl. Com. 483-9. No parol averment varying the condition of a bond, shall be admitted as a plea. Cowp. 47; 1 Esp. 247. The exceptions do not reach this case; they may be reduced to three general heads: 1. To rebut an equity. 2. To ascertain a person or thing which cannot be ascertained by the writing itself. 3. When a clause is left out by fraud or mistake. The case in 3 Atk. 77, was of a circumstance which could *not take place in the writing; Ib. 388, was *172] a suggestion of fraud, and is referred to in 2 Bl. Rep. 1241; 1 Ves. 457, was a mistake, rectified by the minutes. The rule is always adhered to, unless there be fraud. The drawer of the articles there did not pursue the intent of the minutes. 2 Ves. 375. Evidence is never admitted to contradict a written agreement; but a subsequent agreement may. The case of *Harvey* v. *Harvey*, referred to in Fitzg. 240, was that of a deed made to save an estate from sequestration, and this could not be inserted. But without such foundation it would not be admissible. Pow. on Powers, Intr. p. 14.

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[1] S. C. 1 Yeates 132.

[2] Lippincott v. Whitman, 83 Penn. St. 244.

The following cases show that the exceptions are those only which are stated above: 2 Atk. 575; 8 Co. 155; 2 Atk. 239. A blank left in a will, and no parol evidence admitted. 2 Atk. 383; Ib. 373. Declarations made at the execution of a will refused. 1 P. Wms. 3. The rule is laid down, 5 Bac. 362; 2 Vern. 98; 1 Brown Ch. 93, 94; Pow. on Cont. 432; 1 Dall. 83. But—

By THE COURT.—The principle of this case has often been determined. The greatest injustice would prevail if such testimony were rejected.

BRADFORD, Justice.—I concur with the court, upon the authority of *Hurst* v. *Kirkbride*. I have never, it is true, been fully satisfied with that case: it goes one step beyond that of *Harvey* v. *Harvey;* and much further than any other in the English books. Yet, as it has often been recognised in this court, I feel myself bound by its authority. (*a*)

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*McMINN *v.* OWEN. [*173

Parol evidence.

Parol evidence may be given of a contemporaneous parol agreement, explanatory of the written contract between the parties.

THIS was an action of covenant, on articles of agreement, dated 22d January 1779; by which the plaintiff sold to the defendant a plantation;

(*a*) On the trial of the cause above reported, the plaintiff's counsel offered as a witness John Field, the nominal plaintiff, the suit being stated, and proved to be, for the benefit of Oxley & Hancock. They urged, that he was a mere trustee, without any interest whatever in the event of the cause. In McClenachan *v.* Scott, lately determined in the common pleas, it appeared, that after the suit was brought, the plaintiff had become a bankrupt, but the assignees carried on the cause; and the plaintiff was admitted as a witness, reserving the point as to his competency; which was, afterwards, on full argument, determined in the affirmative. A distinction was taken between a voluntary assigment of a *chose in action*, and one by operation of law. So, in McCullum *v.* Coxe, 1 Dall. 139, the plaintiff was held to have no power over the suit, and therefore, he could not be liable to costs.

Lewis, in reply, insisted, that McClenachan *v.* Scott went entirely on the compulsive assignment, and did not apply at all to voluntary assignees. The case in Fitzg. 120, is not supported by the cases cited: in that in Mod., there referred to, the executor was not a party. In 3 P. Wms. 181, the opposite doctrine is laid down. In this case, the court would not have compelled the plaintiffs to lend their names; they might have assigned. Here the plaintiffs are certainly liable to costs; and in Halden *v.* Fisher, executor, the defendant was refused, though he had no interest in the event, and offered to pay all the costs into court.

Ingersoll.—Two principles were determined in McClenachan *v.* Scott. 1. That a nominal plaintiff is not for that reason *alone* to be rejected. 2. That a plaintiff is not in all cases liable to pay costs. 1 Barnes 104. A *prochien ami* is compellable to pay costs; but if the plaintiff is not admissible, neither can a mere trustee be received.

THE COURT inclined to reject the witness, but Justice SHIPPEN doubting, they agreed to admit him, if the plaintiffs insisted, reserving the point. He was admitted accordingly, but the verdict being for the defendant, no motion was made.

See 1 P. Wms. 290; 2 Atk. 229; 3 Id. 95, 604; 2 Ves. 219; Doug. 185; 2 Wils 378.

and the defendant covenanted to pay 500*l.* in annual instalments. The first payment was made, and bonds were given for the residue of the money.

The question now principally agitated, was—whether the money was to be reduced by the scale of depreciation, or to be paid in gold and silver? The plaintiff offered a witness to prove, that at the time of the covenant being executed, it was agreed, the instalments should be paid in whatever money was current, at the time they became due.

Ingersoll, on the part of defendant, objected to this testimony. The value of money in contracts between 1776 and 1781, is ascertained by the act of assembly (1 Dall. Laws, 880). No parol proof is to be admitted to contradict this: it has always been repelled. It was so in *Lee* v. *Biddis*, 1 Dall. 175. The bonds, which are explanatory of the contract, are given to be paid in "lawful money of Pennsylvania." The evidence offered is to vary the agreement. Where the parties reduce the agreement to writing, that alone is the rule. 2 Bl. Rep. 1249. Even conversation of the parties at the time of the contract is not admitted, unless there be fraud. 1 Bro. Ch. 93–4. Powell 430. Ambiguous expressions are not to be explained by parol proof. So was the case of *Benezet* v. *McClenachan*, where proof being offered to show that by the term "specie," used in a policy of insurance, certain paper bills were intended by the underwriters, it was refused.

Sergeant, *Lewis* and *Levy*, for the plaintiff, urged, that the kind of money was not specified, and that this was an ambiguity, like that of a devise of a man to his son John; when he has two sons of that name. Here were two kinds of money in circulation, paper and specie; and the parties do not distinguish, *in the articles, which they mean. The auditors appointed under the act have this power; and shall not the court have it also? The principle of *Lee* v. *Biddis* was, that the court were bound by the words "current lawful money" and the positive words of the act of assembly. The proof is necessary to effect the intention of the parties, and to prevent an undue and fraudulent advantage. The case in Davies 48, proves, that, on principle, this money ought to be paid in such coin as is current *at* the time it is payable: and the act of assembly ought to be construed in consistency with this principle.

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Shippen, Justice.—In *Graff* v. *Whitmer*, it was determined in this court, that such proof might be made; and even after judgment by default, in debt on bond, the cause was sent to auditors to ascertain the value or kind of money. I cannot, in consequence, say such proof ought to be rejected; and this very point has been settled in *Hurst* v. *Kirkbride*.

By the Court.—Let the evidence be heard, and the point reserved for the defendant, if he shall think it proper to move for a new trial.

The verdict being for plaintiff, a motion for a new trial was accordingly made, and argued by *Ingersoll*, at the same time with the case of *Field* v. *Biddle* (*ante*, p. 171): but the counsel for the plaintiff submitted the point without argument. And—

By the Court.—The rule must be discharged.

HENDERSON *v.* CLARKSON.

Prize-agents.

A prize-agent appointed under the act of 8th March 1780 (P. L. 313), could sue for prize-money in his own name, and when the question of "prize or no prize," was not involved, such action would lie in a common-law court.

CASE for money had and received. Plea, *non assumpsit.* The action was brought to recover a sum of money, which the plaintiff claimed as agent for forty-three seamen, to whom it had been decreed in the court of admiralty, as their share of certain prizes taken by the privateer Holker. A writ had been issued from the court of admiralty, directed to the defendant, then the marshal of that court, commanding him to deliver the money to the plaintiff. The defendant made return, that the property in his hands consisted of certain articles specified, which he has ready, &c. Afterwards, the articles were sold.[1]

The *defendant's* counsel moved for a nonsuit, on two grounds. 1st. That the action was not maintainable, in the name of the agent. 2d. That it is not of common-law cognisance, being a question of prize, and to enforce the decree of the admiralty. They contended, that his appointment under the act of assembly, did not give him any power to sue in his own name: the very term agent implies that he has a mere authority. The act is silent on the subject of suits, and leaves him to the operation *of [*175 common-law principles. He has no right or interest vested in him, and the money was not received to his use. A factor may sue in his own name, for he makes the contract, or has a special property.

On the second point, they cited 1 Dall. 218; 3 T. R. 323, 344, 329; 2 Strange 761. They urged, that in the first of these cases it was held, that the *consequences* of a prize cause were not cognisable in a common-law court, although the question of prize or not, was determined and at rest. The judges say, "as this is a suit to carry into execution a decree of a court of admiralty, it is a thing which we have no authority to do." This is an action of the same kind. The goods in possession of the marshal, were in possession of the law and of the court; there is no contract, express or implied, between him and the party who may be interested. While the money is in the channel which the maritime law directs, no common-law courts can take cognisance of it. Will this court interfere between the marshal and the court of admiralty? 8 T. R. 329. Shall a sheriff, receiving money by order of this court, be sued for it in another? Or, would the court permit an action to be brought against a marshal, by every sailor interested in the proceeds of a prize?

The counsel for the *plaintiff* urged, that the agent was an officer appointed by virtue of an act of assembly of the 8th of March 1780, and is known to the law. He is to receive the money, and the unclaimed shares are to be paid over to the Pennsylvania Hospital. The marshal is directed to sell and pay over, under a penalty, by an act of the 22d September 1780, § 10, and surely, the penalty may be waived, and the plaintiff proceed for the

[1] For a fuller statement of the facts of this case, see the opinion of Judge Yeates, in Ross *v* Rittenhouse, *ante*, p. 168.

sum due. Agents may sometimes sue, either in their name, or that of their principals, as factors and consignees. H. Black. 514. Where an agent has an interest as well as an authority, he may bring an action in his own name. Besides, here is a promise in writing, or declaration that he has the money ready. The complaint here is, that the defendant has not forty-three suits brought against him instead of one. If the sailor had died, how should money be recovered for the Pennsylvania Hospital? The agent gives bond; and the plaintiff has been sued on that which he gave.

As to the second point. This has no relation to a question of prize; the money has already been appropriated, and who shall receive it, is the only question that remains. This court is as competent to give relief as the admiralty; and as that court is now extinct, there is no remedy but a common-law suit. He that pleads to a jurisdiction must state another jurisdiction competent to give relief. The case in 1 Dall. 218, does not go the length of this. That in 3 T. R. directly involved a question respecting prize. In *176] 1 Wils. 210, there is an instance *of a suit for prize-money, brought in the name of the assignee, against the agent. So, in *Talbot* v. *Purviance*, 1 Dall. 93, though it was consequential to a prize cause, the court of appeals of Pennsylvania sustained the suit. A later case is strongly in point (H. Black. 515); when prize is determined, the rights of the captors are a foundation for a suit at law; and the same doctrine is maintained, Ibid. 523.

By the Court.—In 1775, congress resolved that all prizes should be the right of the captors. They had the prerogative of making war and peace; and therefore, the jurisdiction in case of prize. This resolution vested a legal right in the captors to all property taken rightfully at sea. What was a legal capture, was to be determined by the courts of admiralty; but, being determined, the legal right was complete. The real meaning of the rule, that the courts of common law will not take into consideration the incidents of a prize cause, is, that they will not review or draw before them the question of prize, which ought to be determined by the law of nations, and in the court of admiralty. Here, the property has been condemned; the marshal is directed to sell it for the benefit of the captors; and the plaintiff is the agent appointed by the judge, agreeable to the 14th section of the act. It is his duty to receive it. To him are intrusted the rights of the absent seamen, and the contingent right of the Pennsylvania Hospital. He seems to be authorised to bring a suit in his own name. Besides, the return of the marshal is an admission of his right, and a promise to pay.

A motion for a nonsuit overruled; and a verdict for the plaintiff.

HALDANE *et al.* *v.* DUCHE'S executors.[1]

Money had and received.—Mesne profits.

The action of *assumpsit* for money had and received is, in many cases, a substitute for a bill in equity, and is governed by equitable principles.

After a recovery in ejectment against the tenants of a possessor in bad faith, and the death of the latter, the mesne profits may be recovered against his executors, in an action for money had and received.

THIS was a motion for a new trial, founded on a declaration made by the court, while the merits were before the jury, that if the counsel for the defendants could show, that, on the evidence given, the action was not maintainable, a new trial should be granted. The action was *indebitatus assumpsit* for money had and received to the plaintiff's use; and the evidence to support it was as follows:

James Duche, the testator, was seised, in right of his wife Hester, of a rent-charge of 12*l.* 8*s.* 4*d.*, issuing yearly out of a house and lot in the city of Philadelphia; and of five acres and three-quarters of meadow land in the neighboring township of Moyamensing. Mrs. Hester Duche died, in June 1779, without issue, and Elizabeth Haldane, one of the plaintiffs, was her heir-at-law; but the plaintiffs were not apprised of their title to the premises, until the year 1785. On the 2d of March *1786, they sold and conveyed the whole of the premises, for a valuable consideration, to John [*177 Duffield, who thereupon instituted an ejectment against the tenants in possession, and recovered. It appeared, however, that before the marriage of Mr. and Mrs. Duche, on the 30th of May 1747, they had entered into marriage articles (which were recorded in August 1779), whereby a power was reserved to the latter to dispose of the personal estate, during the coverture, but no mention was made of her real estate; and accordingly, on the 11th of May 1765, she made an appointment in the nature of a will, disposing of 2100*l.* personal estate, of which a sum of 50*l.* was given to the plaintiff, Elizabeth Haldane, who received it from Mr. Duche. But she also undertook, by the same instrument, to devise her real estate to her husband, and constituted him one of her executors. After her death, Mr. Duche, or his representative, continued to demise the real estate, and to receive the accruing rents arising, as well as the rent-charge, until the 2d of March 1786, to the aggregate amount of 938*l.* 5*s.* 3*d.*, of which the sum of 743*l.* 5*s.* 3*d.* was received by him and the sum of 195*l.* was received by Andrew Doz, one of his executors, subsequently to the conveyance to John Duffield. In addition to these facts, it appeared, that a letter had been written from Mr. Duche to the plaintiff, Elizabeth Haldane, on the 12th of February 1782, stating, that as his son had been attainted of treason, the real estate of Hester Duche might be lost, unless she, as heir-at-law, would convey it to him, and offering 100*l.* for such a conveyance; which offer was augmented to the sum of 300*l.*, by similar letters, dated respectively the 10th of May, and the 24th of July 1784. At that period, Elizabeth Haldane resided in the state of Maryland, and her husband was in straitened circumstances. The plaintiffs having, as above stated, recovered in the ejectment for the premises, brought this action against the executors of Mr. Duche, for the mesne profits; and the jury, con-

[1] s. c. 1 Yeates 121.

formable to the charge of the court, gave a verdict in favor of the plaintiff, for 598*l.* 15*s.*, the amount of the rents from February 1782, until the 2d March 1786.

The motion for a new trial (which was argued at the last term) was supported by *E. Tilghman* and *Lewis;* and opposed by *Ingersoll* and *Sergeant.*

In *support* of the motion, it was contended, that upon the evidence, the present action cannot be maintained, because the testator was a disseisor; and no action will, in such case, lie against executors: that it will not lie, because there was no privity; because the money was received as owner; and because the plaintiffs had conveyed away all their right to the estate. The testator received the money from his own tenants, for his own use; and the case is not tainted by any fraud, concealment *or misrepresentation; nor affected by any question of infancy. For these general positions, the following authorities were cited: 3 Leon. 24; Owen 83; 2 Wils. 115, 208, 213, 217, 645, 744; 3 Atk. 124, 130; 2 Chan. Rep. 26, 32, 259; 2 Cas. in Chan. 71, 134; 1 Chan. Cas. 126; 1 Vern. 296; Prec. Ch. 517; 1 Ves. 171; 2 Atk. 336; 4 Vin. Abr. tit. "Chancery," 388, 389, pl. 5; 18 Ibid. 563; 2 Vern. 696; 3 Bl. Com. 205.

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In *opposition* to the motion, it was urged, that an action of *indebitatus assumpsit* will lie for the true owners, against one who pretends a title to lands, and receives the rents: an action of account will certainly lie, and this may with equal propriety be brought. It will lie for the profits received prior to the demise laid in the ejectment; and whoever receives rents by wrong, shall be construed a trustee, or bailiff, for him who has the right. Besides, the plaintiffs may consider the testator as a disseisor, or not, at their election; and waiving the tort, may proceed on the implied contract. Mr. Duche had certainly no right, in law or equity, to receive the money, and therefore, is not entitled, *ex æquo et bono*, to retain it. But even if an action at law could not be maintained in England, yet the money might, unquestionably, be recovered there in a court of equity; while in Pennsylvania, if it could not be recovered in this action, there would be a right without remedy, since no other remedy can be here pursued. For these positions, the following authorities were cited: 1 Salk. 28; 1 T. R. 378; Cowp. 371; 2 Wils. 644; Prec. in Chan. 517; 1 Bac. Abr. 18; Vin. Abr. tit. "Assumpsit," p. 270.

The Chief Justice, after recapitulating the facts and arguments, proceeded to deliver the following opinion:

McKean, Chief Justice.—This does not appear to me to be a hard or difficult case. If a man receives my rent, it is at my election to charge him with a disseisin, by bringing an assize or other action, or to have an account. Cro. Car. 303, pl. 6; Litt. § 588. But if trespass is brought, and the disseisor dies, it cannot be renewed against his executors, at law; though it may, notwithstanding that *actio personalis moritur cum personâ*, be recovered in equity. It does not seem necessary to determine, whether such an action as the present could be maintained in England; the question here is, whether the plaintiffs are entitled in equity to an account of the rents and profits of Mrs. Haldane's estate; and if so, from what time.

Nothing can be clearer, than that the plaintiffs had a right to the real estate of Mrs. Hester Duche, at her death in June 1779, and to all the rents and profits to be derived from it, from that time. It is certain, that they had this right, in law, equity and conscience, and yet, if they are prevented from recovering *them, it must be owing to some impediment in law or equity. I know of no such impediment; they have a right to receive [*179 this money, from the time their title accrued, unless the testator had no notice of their title; or was in possession under a title, or such a title as he was mistaken in; or there has been a default or *laches* in the plaintiffs, in not asserting their title sooner.

Mr. Duche had all the deeds, and he, of course, knew the title of Mrs. Haldane; but he might possibly have apprehended, that the devise of his wife was good in law to himself: I say, he possibly was under this mistake for a time; but from his letter of the 12th February 1782, it appears, that he then knew his own title to be bad, and that of the plaintiffs to be good. It further appeared to the jury, that Mr. Duche not only concealed the title of the plaintiffs from them, but misrepresented his own. From this time, he was not a *bonâ fide* possessor, and was accountable to the plaintiffs for the rents, whatever might have been the case prior to this time. A man cannot be an honest, faithful possessor of what belongs to others; nothing but ignorance of the facts and circumstances relating to his own and his adversary's titles, can excuse him *in foro conscientiæ*. This cannot be pretended here.

Thus it was summed up to the jury, on the trial, and they found for the plaintiffs accordingly, that is, the amount of the rents from February 1782, until March 2, 1796, which I think was right and agreeable to equity, and the truth of the case. If I erred in the charge to the jury, it was in limiting them to February 1782, and not going back to June 1779, the time when Mrs. Haldane's title accrued. From this circumstance, the defendants retain the rents and profits of an estate, for upwards of two years and a half, to which their testator had neither a legal nor equitable title. The cases cited for the plaintiffs, particularly, Bacon's Abr. 18, Prec. in Chanc. 517, and 2 Wils. 644, support this opinion.

The rule to show cause why a new trial should not be granted, must be discharged.

SEPTEMBER TERM, 1792.

Shaw v. Wallace.[1]

Security for costs.

It is never too late to move for security for costs, if it do not delay the trial.

This cause was set down for trial; but was afterwards continued by the plaintiff. The defendant's attorney, prayed a rule might be granted for security for costs, the plaintiff *residing in New York. *Moylan* ob- [*180 jected, that the motion came too late, after the cause had been marked for trial. But—

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[1] s. c. 1 Yeates 176.

By the Court.—It is never too late to grant the rule, when it will not delay the trial.

Rule granted.

Lynn v. Risberg.

Parol evidence.

Parol evidence is admissible, to supply an ambiguity in an award, by applying it to its subject-matter.[1]

An award was made that "an order for 550*l.*, should be given on —— (not mentioning the name), in whose hands, it is said, that sum was deposited by certain defendants in a former action, for the use of the plaintiff." Risberg, the bail of those defendants, undertook in writing, to give an order for the money, to be received in New Providence; not mentioning by whom. This action was brought for not giving that order, and one Bunch was stated, in the declaration, to be the person on whom the order was to be drawn; and the plaintiff now offered parol proof to show that he was the person intended by the referees. This was objected to; and Gilb. For. Rom., and Bunb. 65, were read, to show that a blank in a charter-party could not be supplied.

By the Court.—The award may be supplied, where it can be rendered certain. So was the case of *Grier* v. *Grier*, 1 Dall. 173. Here are words of reference; and we think it may, in this case also, be supplied by parol proof.

Wood v. Roach.[2]

Evidence.—Stoppage in transitu.

An unsigned copy of a bill of lading, kept by the master, is not evidence *per se*.
The right of stoppage *in transitu* does not exist, where goods are shipped in payment of a precedent debt.

This was a *scire facias* against the defendant, as garnishee of twenty-one hogsheads of flax-seed, the property of James Elliot. The defence was, that the defendant, being a master of a ship, had received the flax-seed, and signed a bill of lading, engaging to deliver the flax-seed to a consignee in Europe. To prove this, *Moylan* offered a bill of lading, not signed, but annexed to an affidavit by Roach, setting forth that it was a copy of one signed and delivered to the consignee, before the attachment was laid. The evidence was objected to: And by—

McKean, Chief Justice.—This is not the best evidence; and therefore, it cannot be admitted.

Bradford, Justice.—The paper offered in evidence is not a bill of lading; but it is offered as a copy, and to prove that a bill of lading, of the same tenor and date, was executed. If the instrument itself were produced,

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[1] s. p. Commercial Bank v. Clapier, 3 Rawle 335.

[2] s. c. 1 Yeates 177.

proof of the signature would be *primâ facie* evidence that it was given when it bears date; but when the instrument does not appear, it cannot be supplied by the oath of the defendant. The evidence was, accordingly, rejected.

Other proof of the bill of lading being received, together with evidence that part of the goods was shipped, and part not; and some, though doubtful, evidence, that the consignment was in favor of a *bonâ fide* creditor, and intended as a remittance to him—

Moylan, for the defendant, argued, 1st. That the bill of lading transferred the property to the consignee. 1 T. R. 205–9. He to whom bills of lading are first delivered, has the legal property; and an indorsement is sufficient to transfer it. It was so ruled in this court, before the revolution, in the case of *Morris* v. ———; where Kearney and Gilbert shipped goods consigned to a merchant, in London, and as soon as the bills of lading were filled up, Morris attached them as the property of the consignee, and the attachment was sustained, though the goods had not been paid for by the consignee. Notice is not necessary, and when a consignment is in satisfaction of a debt, it passes the property, even before agreement. All the cases go upon the goodness of the consideration. So is 4 Burr. 2238; 1 Str. 165.

2d. The goods were liable for the freight, and could not be attached, without tender of the freight, and indemnity to the master. A demand of this indemnity was formally made upon the sheriff, by the master. The lading is liable for the freight, nor is it liable to be attached. Beawes, Lex Mer. 112. Although the vessel does not sail, yet freight is due, if it be detained by the freighter's fault. Moll., lib. 2, c. 4, § 9; Ibid. c. 3, § 19; 2 Eq. Cas. Ab. 98, p. 1. In equity, freight is recoverable, though the goods be not on board. 3 Bac. 598. A pawn or pledge cannot be taken in execution; and all the cases consider the goods *laden* as pawned for the freight: 2 Bac. 352.

For the plaintiff, *Sergeant* and *Todd* contended, that no freight was due until the vessel breaks ground. Beawes 110; Mol. lib. 2, c. 8, § 3. Those authorities mention "breaking ground," as essential. But at all events, this ought to have been pleaded; or might be settled now. Laws, Corp. 245. The bills of lading did not pass the property absolutely; and the goods might be stopped *in transitu*. 2 Term Rep. 63, 70; 3 Ibid. 119, 783; 1 Esp. 327; 1 Atk. 245. Until goods are on board, the consignment cannot take effect.

SHIPPEN, Justice.(*a*)—The facts which the jury must decide, are—1st. Whether a bill of lading was signed as the defendants *contend. 2d. Whether the goods were consigned for the use of the consignee [*182 or consignor. 3d. Whether a real debt was due from the consignor to the consignee. These being determined, the law is clear, that a consignor can stop the goods *in transitu* only in two cases: 1st. Where he has received no consideration: And 2d. Where the consignee is insolvent. If the goods were not vested in the consignee, the defence arising from the demand of freight

(*a*) The Chief Justice being absent.

in Ireland, and received an indemnification from the consignee. He might have pleaded this; and as he has not done so, the matter is left open to equitable considerations. The freight, in strictness, is due when the goods are laden and bills signed. This is a rule founded on mercantile principles, and the inconveniences of the opposite doctrine. The cause, therefore, in the opinion of the court, depends principally, upon this fact, whether, at the time of the attachment, the property of the goods was vested in the consignor or consignee.

Verdict for the plaintiff.

Jones v. Little.

Continuance.

The sickness of the defendant is not alone ground of continuance.

The defendant's counsel produced a certificate from a physician, stating that the defendant had been dangerously ill for three weeks last past; and thereupon, moved to put off the trial. But—

The Court held this to be no good cause for putting off the trial. And—

By Shippen, Justice.—If there had been an affidavit, stating that there were material witnesses, who had not been summoned, in consequence of this sickness; or if the plaintiff himself were a witness, to prove books or the like; that might have weight with the court; but as it is, the trial must proceed.

Knight v. Reese.

Trustee.—Interest.

A mere trustee to pay over, is not liable for interest, until after a demand.[1]

Charles Knight, father of the plaintiff, put out 200*l.* at interest, to be divided among his four children, at their mother's death. The defendant was one of the trustees named in the bond, and had received the money on the widow's decease. The only question was, whether interest should be paid from the time he received it.

By the Court.—Interest is not to be paid by a mere trustee, for the money which he holds for the use of another, unless *he neglects to pay it, on demand. As there is no proof of demand in this case, it must be calculated only from the commencement of the action.

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[1] As to the liability of a trustee for interest, see Bright. Dig. 2202.

WHITE *v.* LYNCH.

Continuance.

The absence of an attorney of the court, who is a material witness, and has promised to attend, is ground for a continuance, though he is not subpœnaed.

THE defendant moved to put off the trial, on an affidavit, that an attorney of this court was a material witness. He had not been *subpœnaed;* but had promised the defendant to attend; and had left town, a few days ago.

Under these circumstances, the COURT did not think a *subpœna* necessary, to entitle the defendant to put off the trial.

BLOOMFIELD *v.* BUDDEN.[1]

Sheriff's sale.—Life-estate.

When land, in which there is a life-estate, is sold under execution, the tenant for life will be permitted to take the surplus out of court, on giving security therefor.

RICHARD BUDDEN devised, after payment of debts, a house, to his wife for life, remainder to James and Susanna, his children. The widow and children afterwards mortgaged this property to the plaintiff, for the proper debt of James. The plaintiff sued out a *scire facias,* and after sale of the house, and satisfaction of the mortgage moneys, the surplus was brought into court, to be disposed of, as the court should direct.

Under these circumstances, *M. Levy* contended, that this debt, which James owed to the widow, was to be considered as a lien on the house, and that the surplus should be paid to her absolutely. Doug. 133; 2 Bl. Rep. 949; 2 Ves. 622; Bro. Ch. 421. Equity favors liens: a factor has a lien for his general balance. 4 Burr. 2220.

THE COURT ordered that the money be paid the widow, she giving security, that her executors or administrators should account for it, after her death, to those in remainder. And in case such security was not given, then that the money be paid to those in remainder, they giving security to pay the annual interest thereof to the widow, during her natural life.(*a*)

SCOTT *v.* MCKISSON.

Costs.

Where a cause is removed to the supreme court, by the defendant, the plaintiff cannot recover costs, if he would not have been entitled to them in the common pleas.

THIS was a special *assumpsit,* on the part of the defendant, to make up the depreciation of a certain sum of money, paid by him to the plaintiff's agent, if the plaintiff refused to receive *it as specie. Upon a reference, the referees awarded only four pounds; and as the cause had [*184

(*a*) This latter rule had been adopted by the court of common pleas, in the case of Whiteball *v.* Houston.

[1] s. c. 1 Yeates 187.

been removed by the defendant, it then became a question, whether the plaintiff should recover double, or any other, costs.

By the Court.—Double costs is a relative term; and it has been settled, that the plaintiff shall not recover double costs here, when, in the court below, he could not be entitled to recover any. Under the late act, giving jurisdiction to the justices, the large powers vested in them seem to embrace this cause of action. There are, indeed, exclusive words in the act, but they do not comprehend the present case. There must, therefore, be

Judgment, without costs.

Rapp *v.* Elliot.[1]

Plea in abatement.

A plea of coverture must be sworn to, or it will be set aside.

The defendant had pleaded in abatement, that the plaintiff was a *feme covert:* and now, *Howell*, for the plaintiff, moved to strike off the plea, not being supported by any affidavit, as the rules of the court require. *Todd* contended, that he could file the affidavit *instanter*, if the court should deem it necessary in this case; but *Howell* said, it was too late, and that a dilatory plea could not be recurred to, at this stage of this proceedings.

By the Court.—As the plea is not supported by any affidavit, it cannot be sustained; and we think it is too late to file a new one. The defendant must, therefore, plead in chief; or the plaintiff will be at liberty to sign judgment.

Fury *v.* Stone.[2]

Remittitur of damages.

Where the damages found by the jury exceed those laid in the declaration, a *remittitur* may be entered for the excess, even after error brought.

The plaintiff laid his damages at 500*l.*; but the verdict and judgment *nisi* were for 672*l.* 13*s.* 2*d.* The defendant, thereupon, took out a writ of error, and next day, the plaintiff moved for leave to enter a *remittitur* of the surplus damages, upon the authority of H. Black. 643; 1 Dall. 134. *Todd* opposed it. But—

By the Court.—There is no difference between this case and that in Blackstone's Reports. We shall always be disposed to favor amendments. Let the *remittitur* be entered, upon payment of the costs of the writ of error.

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[1] s. c. 1 Yeates 185.

[2] s. c. 1 Yeates 186. The judgment in this case was affirmed, on error, by the high court of errors and appeals. Addison 114.

JOHNS *v.* NICHOLS.[1]

Appointment to office.

Under the constitution of 1790, the appointment of the clerk of the Mayor's Court of Philadelphia was vested in the governor.

THIS was a feigned issue, upon which this single question was submitted for the opinion of the court—whether the *power of appointing the clerk of the Mayor's Court of Philadelphia was vested in the governor, or the corporation of the city? [*185

The case was argued, at the last term, by the attorney-general, for the state, and by *E. Tilghman*, for the corporation.

The *Attorney-General* contended, that the clerk of the Mayor's Court is an officer of the commonwealth. In the act of incorporation (2 Dall. Laws, 660, § 19), the powers of the aldermen are defined; but nothing is said of the appointment of the clerk. The fines imposed for offences against the commonwealth are to be paid into the state treasury; and the clerk is the officer, who not only keeps the records of the convictions, but collects the fines. (Ib. p. 20.) The court is, in fact, a court of quarter sessions for the city; and there is as much reason to assert, that the justices of a court of quarter sessions for any county have a right to appoint their clerk, as that the mayor, or recorder and aldermen, have a right to do so. If, then, he is an officer of the commonwealth, the constitution expressly provides that the governor "shall appoint all officers whose offices are established by this constitution, or shall be established by law, and whose appointments are not herein otherwise provided for." Art. II., § 8.

Tilghman stated, that the true question was, whether the act of incorporation gave to the mayor, or recorder and aldermen, the power of appointing the clerk of the mayor's court? By the 3d section of the 7th article of the constitution, it is provided, that "the rights, privileges, immunities and estates of religious societies and corporate bodies shall remain, as if the constitution of this state had not been altered or amended." If, therefore, the corporation previously possessed this power, in exclusion of the supreme executive council, the corporation now possesses it, in exclusion of the governor; and so it becomes the case of an officer "whose appointment is otherwise provided for," within the express exception of the 8th section of the 2d article of the constitution. It is, then, to be considered, either that the corporation at large acquired the power, under the law by which it was instituted; or that the mayor's court acquired the right of appointment, as an incident to their jurisdiction; and the last section of the act of assembly directs the most favorable construction to be made, for the benefit of the corporation. Thus, the 39th section, enacts "that for the well-governing of the city, and the ordering the affairs thereof, there shall be such other officers therein, and at such salaries, or other compensation, as the mayor, recorder, aldermen and common councilmen, in common council assembled, shall direct;" and if the clerk of the mayor's court may justly be deemed an

[1] s. c. 1 Yeates 180.

officer necessary, or useful, "for the well-governing of the city, *and the ordering the affairs thereof," this clause manifestly vested the power of instituting and supplying the office, in the corporation at large, at least, in exclusion of the executive authority of the state. But the very grant of a power to hold a court, carries with it everything that is incidental to the exercise of jurisdiction; and a clerk of the court must be regarded in that point of view. A court may appoint a bailiff, or sergeant, to execute its process, as an incident to the grant of jurisdiction. 1 Bac. Abr. 565. Again, whenever one office is incident to another, such incidental office is regularly grantable by him, who hath the principal office. 3 Bac. Abr. 720, 721. And Lord Coke says, "that the justices of courts did ever appoint their clerks." 2 Inst. 425. The appointment vests, therefore, as an incident to the grant; and may also be asserted upon prescription and usage. Dyer 175; 4 Co. 32. *Holt's Case*, Show. P. C. See Bl. Rep.; 2 P. Wms.; 1 T. R. 196. The power of amotion is incident to a corporation (Doug. 152); and it is to be inferred that the lesser power of appointing a clerk, is also incident. In the first charter of the city, the proprietary appointed the clerk; but all subsequent appointments were made by the corporation. The corporation being responsible, it is essential, that they should appoint their officers; and yet the construction contended for, would annihilate all the power given to them for that purpose, in the 39th section of the act of assembly. The council of censors, in their animadversion upon the 20th section of the old constitution, while they consider the appointment to office, as a natural incident of the executive authority, still contemplate exceptions from the general rule, by which the public welfare may be promoted. Journ. Coun. Cens. p. 139, Second Session.

The *Attorney-General*, in reply.—It is unnecessary to enter into an investigation of the authorities cited from the English books; since this is strictly a constitutional question. The reasoning of the Council of Censors in favor of the executive certainly applies to the present office; and it is conclusive, that the supreme executive power is now vested in the governor. But it is contended, that the right claimed by the corporation is established by the 3d section of the 7th Art. of the constitution; which gives rise to two questions: 1st. Is the appointment in controversy within the meaning of the constitutional reservation? 2d. Had the corporation the right to make the appointment, before the adoption of the existing constitution? In satisfying the inquiry, where the power resided under the old constitution, it must be remembered, that to exclude the supreme executive from the exercise of this natural attribute, the intention must be directly and explicitly expressed. Now, in the act of 1789, no such power was expressly granted to the *corporation; but in the old constitution, § 20, it was expressly *187] provided, that the supreme executive council should appoint all officers, civil and military; and the exposition given to this subject by the council of censors, is binding on the present decision. Upon the whole, the mayor's court must be considered as a judicial institution under the laws of the commonwealth: intended as a substitute for the city court, whose clerk was not appointed by the judges; but, originally, by the legislature; and afterwards, by the executive, upon the authority of the council of censors.

The Court having kept the case under advisement until the present

term, SHIPPEN, Justice (in the absence of the Chief Justice) delivered their unanimous opinion as follows:

SHIPPEN, Justice.—The sole question in this cause is, whether the governor, or the corporation of the city of Philadelphia, has the power of appointing the clerk of the mayor's court? This rests on the true construction of the act of assembly of the 11th March 1789, incorporating the city; and of the state constitution, agreed to in convention, on the 2d of September 1790. By the old constitution of 1776, the supreme executive council had the right of appointing all officers, civil and military, unless those chosen by the legislature, or reserved to the people at large. The act of assembly of the 4th of April 1785, confirms this right in express words, in pursuance of the previous resolves of the council of censors. Under the act of assembly of May the 14th, 1776, the powers of the mayor, recorder and aldermen were vested in the justices of the city court, and the supreme executive council appointed the clerks of the court. It, therefore, appears evident to us, that unless an exception is plainly made, the right of the appointment must be vested in the governor, as the supreme executive power. By the 2d Art. of the constitution of 1790, § 8, the governor is to appoint all officers, whose offices are established by the constitution, or which shall be established by law, not otherwise specially provided for. By the act of incorporation, § 39, it is declared, "that for the well-governing of the said city, and the ordering of the affairs thereof, there shall be such other officers therein, with such salaries as the mayor, recorder and aldermen shall direct, &c." This clause, it is said, vests the right of appointing the city clerk in the corporation at large. But we think it evidently relates to officers necessary for conducting and managing the internal police of the city—to salary officers, who shall receive a compensation, stipulated by the common council for their services: it cannot, in our opinion, apply to the office of the clerk of the city court, whose duties are analogous to those of the clerks of the sessions, in the counties of the state, and who are appointed by the governor.

*Our opinion, therefore, is, that the power in question, rests with the governor, agreeable to the true intent of the constitution.(a) [*188

(a) Though indisposition prevented the attendance of the Chief Justice, he had prepared the draft of an opinion, of which the following is a copy.

McKEAN, Chief Justice.—This case was argued last term by the attorney-general in behalf of the plaintiff, and Mr. Tilghman in behalf of the defendant, and was held by the court under advisement until this term, not on account of any difficulty in it, but because the court rose soon after, and a respect was due to the dignity of the parties interested in the question.

The sole point is, whether the governor of Pennsylvania, or the mayor, recorder and aldermen, or corporation of the city of Philadelphia, has the legal power to appoint and commission the clerk of the mayor's court for the city of Philadelphia? The solution of this question depends on the present constitution and laws of Pennsylvania. We cannot be guided by the laws or usage of Great Britain, with respect to the appointment of clerks, or officers of courts of record there, however we may approve them in this particular.

In the act entitled, "An act to incorporate the city of Philadelphia," passed the 11th March 1789, the office of clerk is not mentioned by name; but such an officer is necessary to a court of record, and by the common law, it is incidental to such a court to

*Respublica v. Ashew.[1]

Criminal practice.

The defendant's affidavit cannot be read, in mitigation of sentence.

The defendant was indicted for a libel; and at the last *nisi prius*, retracted his plea and submitted, protesting his innocence, &c. He now appeared to receive judgment, and his own affidavit was offered to be read in mitigation of the fine. But—

By the Court.—It has been usual to hear the defendant, without oath; but we have never known his affidavit received, although it goes only in mitigation of the fine.

Affidavit refused.

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appoint such an officer. Besides, by the 29th section of that act, the corporation have an express power given them to appoint all such officers as they shall think necessary for the well-governing of the city, and the ordering of the affairs thereof. It is now unnecessary to inquire, whether this section militated with the constitutional powers of the supreme executive council, or a former legislative construction of them, as we must be governed by the present constitution.

By the 1st section of the second article of the constitution, "The supreme executive power of this commonwealth is vested in the governor." By the 8th section of the same article, "he shall appoint all officers, whose offices are established by that constitution, or shall be established by law, and whose appointments are not therein otherwise provided for." In the 6th Art., § 4, "all commissions shall be in the name and by the authority of the commonwealth of Pennsylvania, and be sealed with the state seal, and signed by the governor; and by the 5th section of the same article, "the treasurer is to be appointed by the members of both houses." "All other officers in the treasury department, attorneys-at-law, election officers, officers relating to taxes, to the poor and highways, constables and other township officers, shall be appointed in such manner as is, or shall be, directed by law." Here then is an enumeration of the officers whose appointments shall be, or may be, made otherwise than by the governor, and this is the only provision in the constitution which limits his authority of appointing to office. The clerk of the mayor's court is a public officer; he is concerned in the administration of justice, and resembles in all respects the clerk or prothonotary of the supreme court, and of the courts of common pleas, quarter sessions and orphans' courts, all of whom are appointed by the governor; and what reason can be assigned for his being appointed otherwise, which will not equally apply to them? All commissions must be signed by the governor, and run in the name of the commonwealth. We need not here investigate the distinction between officers that may be appointed without commissions, and those who are to be commissioned; as the clerk of the mayor's court comes under the latter class, as much as the clerk of any other court. Perhaps, it might have been better, if the courts of justice had been empowered, respectively, to appoint their own clerks; it would have been more agreeable to the usage in England and most of the American states; but the convention have thought otherwise.

On the whole, I am of opinion, that the governor has the legal power to appoint and commission the clerk of the mayor's court for the city of Philadelphia, and that judgment be given for the plaintiff.

[1] s. c. 1 Yeates 186.

Morris's executors *v.* McConnaughy.[1]

Contribution.

When lands are devised, incumbered by a mortgage, not created by the testator, the several tracts must contribute to its payment, in proportion to their respective value.[2]

James McConnaughy mortgaged to the plaintiff's testator, a certain plantation in Chester county; and then devised all his estate, consisting of many other tracts of land, to his mother Janet. Janet afterwards died, having devised the tract in mortgage to her niece Mrs. Darlington, and the residue of her estate to her executors. The plaintiff having obtained judgment on the bond which accompanied the mortgage, a motion was made that the sum due should be levied on *the lands mortgaged; and that the residue of the estate should be discharged. After argument, several times, the court now delivered their opinion as follows: [*190

By the Court.—We are of opinion, that all the lands which were the property of James McConnaughy, deceased (upon which we understand the sheriff has already levied), shall contribute, according to the value of the several tracts, to pay off and discharge the debt, interest and costs in this action. We consider real property in Pennsylvania as assets for the payment of debts; and it is always, in case of the deficiency of personal property, to be applied to discharge such debts. It does not appear from the will of Janet McConnaughy that her intention was, that Mrs. Darlington should take the land devised to her *cum onere.* It is, however, equally subjected to the payment of a proportion of the debt with the other lands of James McConnaughy, remaining undisposed of. Mrs. Darlington claims as a specific devisee; the residuary legatees cannot be considered as such. To charge the lands devised to them with a ratable part of the debts, would not disappoint the true intention of either of the wills; but to charge the lands devised to Mrs. Darlington would evidently produce that effect. We are, therefore, of opinion, that all the real estate of James McConnaughy should ratably contribute.

Bradford, Justice, having been of counsel in this cause, took no part in its decision.

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[1] s. c. 1 Yeates 189.

[2] See Ruston *v.* Ruston, *post*, p. 248, and Mason's Estate, 1 Pars. 129, 137, which was affirmed by the supreme court. A devise of land acquired by a testator, subject to a subsisting mortgage created by a former owner, takes it charged with the incumbrance, without any claim for its satisfaction out of the personal estate, unless the will indicate an intention to charge the same on the personal estate, or the testator has so dealt with the incumbrance as to make it his proper debt. Hirst's Appeal, 92 Penn. St. 491.

WALKER'S APPEAL.

Certiorari.

On an appeal from the decree of the orphans' court, the regular mode of bringing up the record is by *certiorari*.[1]

Ingersoll moved for the confirmation of the decree of the orphans' court of Northumberland, given the 26th March 1792, from which (as it appeared, by a certificate he produced) an appeal had been entered. But the COURT, finding that there was no copy of the proceedings lodged with the prothonotary, refused to receive the motion: and by—

SHIPPEN, Justice.—The regular method of bringing up the record is by *certiorari*; and nothing else can stay the proceedings below.

SHEREDINE *v.* GAUL.

Tender.

A mere offer to pay money is not a legal tender.
To take advantage of a tender, the defendant must plead it, and bring the money into court.[2]

THIS was an action of debt on a bond, dated the 13th March 1787. The bond recited that the obligee, Paul Sheredine, had given a letter of attorney to the obligor, Martin Gaul, to recover a legacy due to him in Germany; and the *191] *condition was, that the obligor should, on or before the 1st January 1789, render to the obligee a true account of, and pay over, all moneys received by virtue of the power. On the 17th November 1791, the bond was assigned by Paul Sheredine, to Abraham Sheredine, who brought the present suit, in his own name, and the issue was joined on the plea of performance of covenants. It appeared, that the defendant had received a certain number of guilders, but they were one-third less in value than German guilders; and that he had offered to pay the money to the plaintiff in the coin in which he had received it.

It was contended by *M. Levy*, for the defendant, that there was in this case a sufficient tender and refusal (3 Term Rep. 554); and this being a bond for the performance of conditions, it is not within the provision of the act of assembly, enabling assignees to sue in their own names; which speaks only of suits on bonds "for such sum of money as is therein mentioned;" so that the plaintiff must be nonsuit. 1 Dall. Laws, 107; 2 Ld. Raym. 1271; 1 Ibid. 1362.

But *Sergeant* answered, that, in the first place, there could be no nonsuit, after plea of payment, or performance of covenants; and in the next place, that the practice of Pennsylvania would justify the form of action. As to the tender, it is a mere offer to pay; and at all events, it ought to have been pleaded.

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[1] Though it is the general practice to sue out a *certiorari*, to bring up the record of an appeal from the orphans' court, such writ is not indispensable. See Feather's Appeal, 1 P. & W. 322; Konigmacher *v.* Kimmel, Ibid. 207; Chillas *v.* Brett, 5 Clark 325; Tryon *v.* Cadwalader, 3 Luz. L. Obs. 226; Nixon's Estate, 8 W. N. C. 390.

[2] See act 12th March 1867 (P. L. 35), as to the effect of a tender, after suit brought.

By the Court.—Whether the action is regularly brought, we are willing to reserve as a point for future consideration: but on the merits, we can see no ground for a verdict in favor of the defendant. A mere offer to pay the money is not, in legal strictness, a tender; and even if the tender was, in itself, sufficient, the defendant is not entitled to take advantage of it, unless he pleads it, and brings the money into court: for a verdict now given in his favor on the present pleadings, would for ever discharge him from the plaintiff's demand.

Little has been said on the score of interest. That, however, depends upon the time of the defendant's receiving it, before or after the 1st of January 1789, when he was bound to render his account.

Verdict for the plaintiff.

Grubb's executors *v.* Grubb's executors.[1]

Practice.—Removal of cause.

A cause is not removable to the supreme court, by *certiorari*, after referees have entered upon their duties, though they had not agreed upon their report.

This cause being referred in the common pleas, the referees made report into office; and afterwards, the plaintiff removed the cause by *certiorari* into this court.

*But *Ingersoll*, on behalf of the defendant, now moved for a *procedendo;* alleging that in a case of *Pigot* v. *Young*, it had been [*192 decided, that a cause could not be removed, after the arbitrators or referees had entered on the business submitted or referred to them.

And The Court, accordingly, awarded a *procedendo.*

Vaughan *v.* Blanchard.

Execution of commission.

It is not necessary the witnesses should be sworn by the commissioners; if the oath was administered by a justice of the peace, it will be presumed to have been done in their presence.

Heatly offered to read the return on a commission to examine witnesses, in which it was certified, that the witnesses were duly sworn by a justice of the peace, and examined by the commissioners. *Sergeant* objected, that the commissioners themselves should have administered the oath; or that if administered by a justice of the peace, he should himself have certified the fact. But—

By the Court.—It is not necessary that the commissioners should administer the oath themselves; and it is to be presumed, that it was administered in their presence.

[1] s. c. 1 Yeates 193. [2] s. c. 1 Yeates 175.

MALLORY *v.* KIRWAN. (*a*)

Bills of exchange.

Unless notice of non-acceptance be given to the drawer of a bill of exchange, within a reasonable time, he is discharged.

THIS was an action on a bill of exchange, against the drawer. The bill was dated the 29th of September 1781, and was drawn on the defendant's tenant for 50*l.*, "being my part of the rent of Black Rock estate." It was presented for acceptance and refused, some time previously to the 19th of November 1781; but it was not protested until the 5th of August 1782. No notice of the protest was given, nor was any personal application made to the defendant, until some time in the beginning of the year 1790; though it appeared, that in the year 1790, he acknowledged having heard that the bill was not paid, so far back as the year 1783. When the bill was presented, the drawee had funds belonging to the drawer, in his hands; but he had paid the amount to the drawer's attorney in fact, who soon afterwards died, and the money was lost by his wife, to whom he had intrusted it, just before his death.

For the defendant, *Sergeant* contended, that the want of notice was a complete discharge. The money was in the hands of the drawee, when the bill was presented; and therefore, the plaintiff has no excuse, in law or equity, for the gross negligence of which he has been guilty. Esp. 47; *193] Bull. N. P. 271, 3, 4; *Esp. 54–55; 2 Wils. 353; 1 Dall. 234, 270, 252.

For the plaintiff, *Morgan* urged, that the loss had not happened from the negligence of the plaintiff; that the fund on which the bill had been drawn was virtually paid to the defendant himself, since it was paid to his authorised attorney; that, therefore, the case should be considered as if no effects had been in the hands of the drawee, when no protest or notice is necessary (Esp. 51); and that no particular form of notice ought to be enforced, if it appears, as it does appear, that the defendant had an early knowledge of the fact.

BY THE COURT.—The sole question is—whether the defendant is bound to pay the bill, under the circumstances of this particular case? It was drawn in September 1781; it was presented, and refused acceptance, in November 1781; and yet it was never protested until August 1782. This is, in our opinion, a fatal delay. The protest and notice are required, upon principles of convenience; and it is not necessary, that there should appear to be an actual loss, in consequence of neglecting them. Though what shall constitute a reasonable time for giving notice is a matter to be left to the jury, under the peculiar situation of our country; yet the rule is a general one, that reasonable notice of protesting a bill shall be given to the drawer. We think the rule has been grossly violated in the present case; and of course, that there ought to be a verdict for the defendant.

Verdict for the defendant.

(*a*) Decided at *nisi prius*, Delaware county, 11th October 1782, before YEATES and BRADFORD, Justices.

KNOX *et al.* v. JONES. (*a*)

Interest.—Custom of trade.

Interest is due on a claim for goods sold, after six months—such being the established custom of the trade.

THIS was an action on the case for goods sold and delivered; and the only question agitated upon the trial, was, whether the plaintiff was entitled to recover interest? It was proved, that at the time of the sale, the defendant was informed, that it was the course of the trade to give six months credit; or, if cash was paid, to discount five per cent.; but that punctuality, and not interest, was the object of the plaintiffs.

BY THE COURT.—The established course of the plaintiffs' trade is proved; and also, the knowledge of the defendant. *It appears, therefore, to be a part of their contract, that interest should commence, at the expiration of the six months' credit. [*194

Verdict accordingly.

STILLE v. LYNCH. (*b*)

Competency of witness.

The payee of a note is not a competent witness to invalidate it, for want of consideration, in an action by the indorsee against the maker.[1]

THIS case was an action brought by the indorsee of a promissory note, against the maker; and it was contended, on the part of the defendant, that the note, having been given without any consideration, was subject to the same equity in the hands of the indorsee, to which it was subject in the hands of the indorser, the original payee. 1 Dall. 441. To establish the defect of consideration, the testimony of Lynch, the indorser and original payee (who had since obtained his certificate as a bankrupt) was offered:

But it was ruled by THE COURT, that Lynch could not be a witness in this case; as he was offered, in fact, to invalidate his own instrument. *Walton v. Shelley*, 1 T. R. 296.[2]

(*a*) This case was decided at Philadelphia *nisi prius*, held in November 1792, before the CHIEF JUSTICE, and SHIPPEN and BRADFORD, Justices.

(*b*) This case was decided at Philadelphia *nisi prius*, held in November 1791, before the CHIEF JUSTICE, and SHIPPEN and BRADFORD, Justices

[1] Bank of Montgomery County *v.* Walker, 9 S. & R. 229.

[2] The case of Walton *v.* Shelley, though shortly afterwards overruled in England (Jordaine *v.* Lashbrooke, 7 T. R. 601), has always been received for law in Pennsylvania. Gest *v.* Espy, 2 Watts 265; Bank of Montgomery County *v.* Walker, 9 T. & R. 232; Harding *v.* Mott, 20 Penn. St. 469; Barton *v.* Fetherolf, 39 Id. 279; Klapp *v.* Lebanon Bank, Ibid. 489; Thompson *v.* Bank of Gettysburg, 3 Grant 119. And see Bright. Dig. 1032–35.

Cupisino v. Perez.

Decree in admiralty.—Powers of master of vessel.

A judgment of the court of admiralty, directly upon the question, is conclusive in a court of common law.

The master has no power to hypothecate his vessel for a loan of money, in a foreign port, except in case of necessity, when the voyage would be otherwise defeated, or at least retarded.

This was an action brought against the defendant, owner of the brig Santissima Trinidad, for money lent to the master in the Havana, who gave the plaintiff the following note:

"Received of Mr. Santiago Cupisino, the sum of two hundred dollars current money of Mexico, for the victualling and first expenses of the brigantine, which sum I will pay, at first sight, in the name of the owner, Don Juan Joseph de Aguire Perez, who is in Philadelphia; which cash I receive, mortgaging the freight, the brigantine and her rigging, as the said Santiago Cupisino has lent me the above sum, for the advantage of the vessel at Havannah, June 6th, 1788.

(Signed) Narisco Sanchez y Serna."

On her arrival at Philadelphia, the brig was libelled on this hypothecation (as it was called) in the admiralty, and after hearing, the libel was dismissed.[1] It appeared, that the master had goods, his own property, on board; and that he might have procured money from the intendant of the place, without pledging the vessel.

*195] *Heatly*, for the plaintiff, contended, that the general principle was, that the owner was bound by all acts of the master. 2 Emerig. on Ins. 422, 448. It is laid down in Cowper 639, that whoever supplies a ship with necessaries has a threefold security, the ship, the owners and the master: and the same doctrine is recognised, 1 Term Rep. 108. As to the decree of the judge of the admiralty, it was founded wholly on the informality of the hypothecation, and therefore, not conclusive.

Moylan, for the defendant, contended: 1st. That the admiralty had already decided on the merits of the case, and that the hypothecation was adjudged void, because there was no necessity to warrant it. In *assumpsit*, a decree of the admiralty, on a libel for wages, is conclusive against the plaintiff. 1 Esp. 178. So, a decision of the Leghorn court was held conclusive. 2 Str. 733. 2d. But be this as it may, it is clear, that if a master borrows and impawns the ship, without necessity, it will not be good. Hob. p. 12; Mol. lib. 2, ch. 2, § 14; 3 Mod. 244–5. 3d. He contended, in the last place, that the master cannot make his owners *personally* liable, by his contract in a foreign port. Molloy, lib. 2, ch. 11, § 11, is in point, and so is *Johnson* v. *Shippin*, 1 Salk. 35. The case in Cowper only applies to a contract for necessaries, in the port where the owners reside. The *dictum* in Emerigon is too extensive in its terms, and in other parts of the same book is limited. Thus, in p. 424, it is stated, that the master cannot hypothecate where the owners reside.

By the Court.—It is clear, that the master can hypothecate his vessel

[1] The Santissima Trinidad, Hopk. Dec. 35; s. c. Bee 353.

only in case of necessity—such a necessity as this, that if he did not take up the money, the voyage would be defeated, or at least retarded.[1] This does not appear to have been the case, in the present instance. But in addition to that general rule, it is held, that the master cannot hypothecate, while there are goods of *his own*, or of his *owner* on board. Now, if there was no authority to hypothecate the vessel, how can it be pretended, that he can make his owners personally liable? Great mischiefs would ensue, if the master had such a power. Upon this ground, therefore, the action must fail.

Another point also is in favor of the defendant; namely, that this very question has been already decided in the court of admiralty. Since, then, we think, he had no authority to bind the persons of his owners, in a foreign port (and, in point of fact, he does not seem to have done it, as the writing appears to bind only the master and the vessel), and since the decision of the admiralty on the merits, is, in our opinion, conclusive, the plaintiff ought not to recover.

Verdict for the defendant.

JANUARY TERM, 1793.

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*Boyce v. Moore. [*196

Evidence.—Marine protest.

A marine protest, to be admissible in evidence, must have been made at the first port at which the master arrived, after the loss of his vessel, if practicable.

In this action, which was brought on a policy of insurance, subscribed the 8th of September 1786, the plaintiff declared for a total loss, and offered in evidence the protest of the master, made at Alexandria, on the 22d September, but it appearing that the master who had been taken up at sea from the wreck, had arrived at Newbury-Port in New England on the 12th of August, and passed through Philadelphia, on his way to Alexandria, before he made his protest, the evidence was objected to—the defendant insisting that the protest ought to have been made at the first port, and cited 1 Dall. 317, as in point.

Levy contended, that where a protest is offered to excuse the master's conduct, more strictness might be required. In Wesk. 432, it is stated, that the protest must be made at any place, where the master first arrives; but if that be impossible, he must make protest at any subsequent port. Here, the master states in his protest, that he could not make it, for want of money to pay the fees; he lost everything with the vessel.

McKean, Chief Justice.—Where there is no notary, a protest may be made before a magistrate. The excuse offered in this case, for not making

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[1] Thomas v. Osborne, 19 How. 22; The Fortitude, 3 Sum. 228; The Emperor, Hopk. Dec. 5; s. c. Bee 339.

the protest at the first port, would be a very flimsy one, even if proved by indifferent witnesses. Protests are only admitted, from necessity; and the rule which requires that they should be made at the first port, is a good one, to prevent abuses. If it be not *practicable* to make it at the first port, it must be made at the *next*, where it is practicable. This protest, therefore, cannot be received as evidence.

PLEASANTS, administrator, *v.* PEMBERTON, administrator.[1]

Competency of witness.

The rule that a person shall not be permitted to give testimony to invalidate an instrument which he had signed, is restricted to such as are negotiable.[2]

THIS was an action brought to recover a child's share of the intestate's estate. The defendant gave in evidence a receipt from the guardian of the child, for "four thousand Continental dollars" dated the 19th of February 1780, while Continental money was a legal tender, but depreciated fifty for one. Upon this, the guardian (who was released so as to make him a *197] *disinterested witness) was offered to prove, that at the time of payment, it had been agreed, that the value of the Continental money so paid, should be adjusted afterwards, and credit given accordingly. This testimony was opposed by *Sergeant*, for the defendant, upon the principle, that no man shall be allowed to contradict or explain away his own instrument. The case in 1 Term Rep. 296, speaks of deeds as well as of negotiable paper. This evidence is to invalidate the force of the receipt, and to add a condition, which will take off 49-50ths of its operation. Great inconveniences might arise, and third persons may be deceived and injured, if such explanations are admitted.

Ingersoll, for the plaintiff, urged, that the rule is confined to negotiable paper. It is so settled, 3 Term Rep. 33, 36. Besides, it is not proposed to contradict the receipt, which only expresses the receipt of 4000 Continental dollars; but it would be fraudulent, to prevent the plaintiff from showing that the *value* was afterwards to be settled, in order to set up the implication of law against us. No inconveniences can arise; for it is clear, a third person may be admitted to explain. Even an attesting witness was admitted in *McMinn* v. *Owen* (*ante*, p. 173).

Sergeant, in reply, said, that before SHIPPEN, President, in the common pleas, a master of a vessel was not allowed to prove, that he did not receive the goods mentioned in the bill of lading.

MCKEAN, Chief Justice.—The general expression in *Walton* v. *Shelley* must be limited, as explained in *Bent* v. *Baker*, 3 T. R. 33, 36; and therefore, since the witness is disinterested, he must be admitted. Besides, he is not to contradict the writing, or deny anything that is in it.

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[1] s. c. 1 Yeates 202.

[2] Hepburn v. Cassel, 6 S. & R. 113; Parke v. Smith, 4 W. & S. 287; Wilt v. Snyder, 17 Penn. St. 77; and the rule has no application, where the suit is not upon the bill or note itself. Wright v. Truefitt, 9 Penn. St. 507; Campbell v. Knapp, 15 Id. 27

RESPUBLICA *v.* KEPPELE.

Apprentices.

A guardian cannot bind out his ward as a servant.

A HABEAS CORPUS was issued to bring up the body of Benjamin, a minor, about fourteen years old, who had been bound, by his guardian's consent, to the defendant, to serve her until he should arrive to the age of fifteen. Having absconded from her service, he was committed to jail, for that cause; and a general question was made, whether an infant could be bound as a servant, in Pennsylvania?

THE COURT were unanimously of opinion that the indenture, in this case, was void, and gave their opinions *seriatim*.

The opinion of Justice BRADFORD (which is all I have in my notes) entered fully into the principles of the decision as follows:

*BRADFORD, Justice—The imprisonment of this infant, if justified at all, must be supported under the act of 1700, respecting servants; [*198 so that the only question for our determination is, whether he be a servant within the meaning of that act of assembly? 1 Dall. Laws, 13.

It is clear, that this indenture, by which the infant is bound to *serve*, and not to learn any trade, occupation or labor, cannot be supported upon the principles of common law, nor by the express words of any statute. But it is said, that it depends upon the *custom of the country*; and it is evident, that such a custom is referred to in our laws. I have taken some pains to ascertain its origin and extent.

This custom seems to have originated with the first adventurers to Virginia, and to have arisen from the circumstances of the country. Persons desirous of coming to America, and unable to pay for their passage in any other way, shipped themselves and their children, as servants. If they were imported under indenture, those indentures were held good, and they were to serve according to their stipulation; but if there was no indenture, they were to serve according to the custom, to wit, five years, if of full age, or above seventeen; and if under seventeen, until they arrived at the age of twenty-two, or, in some places, until twenty-four. The early laws of Virginia and Maryland (some of them so early as 1638) speak of these servants, thus imported: they are called, "servants according to the custom;" "servants bound to serve the accustomary five years;" and sometimes are described as "servants sold for the custom."

These servants were in a very degraded situation. They were a species of property, holding a middle rank between slaves and freemen; they might be sold from hand to hand; and they were under the correction of laws exceedingly severe.

It appears by all the early laws on this subject, that the custom extended to *imported* servants only; and it extended to all such as were imported, whether minors or adults. The custom was founded on necessity; and it was thought to be mutually beneficial to the colony and to the emigrant. But no such necessity existed as to the children who were already in the province; the custom, therefore, never extended to them. And there was, in all the colonies, and particularly in Pennsylvania, a marked distinction between these two classes of minors. This is to be found in the articles of the

laws agreed on in England, and more fully in the laws of 1682. These speak only of imported servants; and direct how long such servants, brought into the province without indentures, shall serve; but in chap. 112, all parents and guardians in the province are enjoined to teach the children under their care to read and write, until they are twelve years old, and that *199] *then* they be instructed in some useful *trade or skill.[1] This policy of putting children out as *apprentices*, is carried into our poor laws, and those which relate to orphans. Overseers of the poor, and the orphans' courts, have no authority to bind out minors as *servants*, even such as are the objects of public charity. They must be bound apprentices to some "art, trade, occupation or labor." There have been instances of children here being bound out as servants; but this has not been general; and the courts of justice have always frowned on the attempts.

I agree, that it is not necessary to determine how far a father may transfer to another, the right which he has to the service of his children, in consideration of that other's instructing him in reading, writing and the like; nor whether the court would interfere to take the child out of such person's custody. But I think it right to say, that no parent, under any circumstances, can make his child a *servant*, in the sense in which this boy is held as such. Though he is entitled to the service of his child, he cannot enforce it, as a master can that of his servants; he cannot commit him to jail, if he runs away; he cannot demand the penalty of five days' service for every day of absence; and therefore, it is impossible that he can transfer such right to another.

I am, therefore, of opinion, with the rest of the court, that this boy is not a servant, within the meaning of the act of 1700; and consequently, he must be discharged.

Barnes's Lessee *v.* Irwin *et al.*

Execution of power.

When, by an ante-nuptial agreement, the intended husband covenants that the wife shall have full power to dispose of her real estate, by deed or will, during coverture, she may execute such power, in her husband's lifetime, by an instrument in the nature of a last will and testament.

This cause was argued upon a case stated, which included the following facts. The plaintiff was heir-at-law for one moiety of the real estate of Margaret Henderson, who died seised of the premises in question. Previous to her marriage with Mathias Henderson, articles of agreement, dated the 29th of June 1794, were executed between them and a third person; by which Matthew Henderson covenanted, that the real estate belonging to her, should be to their joint use, during the marriage; but that Mrs. Henderson should have full power to dispose of it, by deed or will, during coverture. They had no issue. On the 29th January 1790, during the coverture, Mrs. Henderson made a will in the usual form, appointed the defendants her executors, and gave them power to sell her real estate; the moneys arising

[1] Old Province Laws, 149; and see Commonwealth v. Schultz, Bright. Rep. 29, as to German redemptioners.

from which were bequeathed, except some charitable legacies. To the plaintiff she left five shillings. The defendants entered and sold.

*The case was argued on the 19th of January 1792, by *Bankson* and *Rawle*, for the plaintiff, and *Wilcocks* and *Sergeant*, for the defendants. [*200

For the *plaintiff*.—It is admitted by the defendants' counsel, that the devise was void at law, and we contend, that it would not be established in equity. A defective will, or the defective execution of a power, will not be aided in a court of chancery, for a meritorious or valuable consideration, and the heir-at-law, where the equity is equal, will not be disturbed in the enjoyment of his legal advantage. Pow. on Powers, 90, 155–165 ; 3 Atk. 715; Amb. 474. In this case, the parties all stood in equal relation, and there was no meritorious claim on the side of the devisees ; they were not children unprovided for, they had no claim on the testatrix. Max. in Eq. 67–8. Whatever was the intention of Mrs. Henderson (though it was argued to have been to bar her husband, from the terms of the agreement), if that intention was not executed, chancery would not carry it into effect against the heir. Pow. 136, 164 ; Com. Rep. 250 ; Vern. 68. Chancery, indeed, exercises this power only in case of trusts, and never on legal estates. 2 Ves. 193 ; Ambler 467 ; Fearn. 89. It is true, that equity is admitted as a part of the law of Pennsylvania (1 Dall. 211); yet it must be applied with caution, as the full remedies of a court of chancery are not in our power; and the act of assembly, directing the mode of conveying the estates of *femes covert*, would, on the defendants' principles, be altogether unnecessary.

For the *defendants*, it was contended, that courts of chancery would favor the execution of such a power, and *Wright* v. *Cadogan*, Ambler 469, and *Rippen* v. *Dawding*, Ibid. 565, were relied upon, as in point, while 2 Term Rep. 695, was also read, to show, that Lord Kenyon held the same principles.

For the *plaintiffs*, it was replied, that *Wright* v. *Cadogan* was conformable to the principles stated for the plaintiffs, but did not apply in the defendants' favor. That *Rippen* v. *Dawding* (or *Hawdin*, as it is called in Powell on Contracts) was a solitary questionable case. That it contradicted *Peacock* v. *Monk*, 2 Ves. 193, and *Bramhall* v. *Hall*, Ambler 467. That Ld. Kenyon referred expressly to *Peacock* v. *Monk ;* but took no notice of *Rippen* v. *Dawding ;* so did Ld. Thurlow, in Bro. Parl. Ca. 16 ; from whence it was inferred, that it was not held as law even in *England*.

Cur. adv. vult.

In April 1792, a further argument was requested by plaintiff's counsel, and granted : but at the next term, September 1792, they informed the court, that they meant to leave the cause on the former argument.

THE COURT then desired the following points might be further considered.

*1st. How far the case of *Rippen* v. *Dawding* is shaken by *Hodston* v. *Lloyd*, 2 Bro. Ch. Ca. 544. [*201

2d. How far the difference between a devise to children as in *Rippen* v. *Dawding*, and a devise to nephews, &c., as in this case, may operate; 1 Ch. Ca. 247; 2 Bro. C. C. 380.

3d. Whether these articles can operate as a covenant to stand seised to uses. 1 Co. 175; Powell on Powers 210.

4th. Whether the articles are to be considered as executory. 7 Mod. 147.

5th. Whether the bare consent of the husband, *anterior* to the marriage, can give the wife a power.

But, in January 1793, the COURT informed the counsel, that upon consideration, they had removed their own doubts; and did not, therefore, desire a further argument. They then proceeded to deliver their opinions.

McKEAN, Chief Justice.—The question arising on the case stated for our opinion, is, whether a *feme covert*, seised of a real estate in fee, can, in consequence of a power contained in articles, executed between the husband and her, before their marriage (the legal estate not having been conveyed to trustees), give away such estate by will, or any instrument in nature of a will, during the coverture?

The articles of the 29th of June 1774, are therein called a deed *tripartite*, and the name of James Wallace is introduced into them as a party, along with Margaret Irwin and Matthew Henderson; and they are executed by all three; but no estate is thereby conveyed to James Wallace, as a trustee, or otherwise. Margaret Henderson, during her marriage with Matthew Henderson, makes a disposition, by an instrument in nature of a will, dated January 29th, 1790, of all her estate, real and personal.

It is very clear, that a *feme covert*, by virtue of an agreement between her and her husband, before marriage, may dispose of her *personal* estate by will or testament; because it is to take effect during the life of the husband; for, if he survived her, he would be entitled to the whole, and therefore, he alone could be affected by it. *Peacock* v. *Monk*, 2 Ves. 191.

It is also clear, that a married woman cannot devise her real estate. By the statute of the 34 & 35 *Hen. VIII.*, § 14, it is expressly enacted, "that wills made of any manors, lands, tenements or other hereditaments, by any woman *covert*, shall not be taken to be good or effectual in law."

It is further agreed, that if the *legal* estate in the lands had been vested by the deed or articles in James Wallace, the appointment by Margaret Henderson would be valid and good in equity: for, then, she would have *202] had only an *equitable* interest; *a confidence would have been reposed in the trustee, that he would make such estates as she should direct; and her will would have amounted to a direction, which bound his conscience, and which a court of chancery would enforce. 2 Vesey 192; 6 Bro. Par. Ca. 156; Powell, Cont. 67, &c.

But in this case, Margaret Irwin, or Henderson, was the donor, and also the donee of the power; and it is contended, that she could not execute it, during her coverture, because the fee still remained in herself, and she was restrained by the statute of *Hen. VIII.* from making a *will;* and by the maxims and rules of the law, she is disabled, as having no will or her own.

The instrument of 1790, executed by Margaret Henderson, being then *covert*, is not strictly a will, but distinct from it, though in nature of a will. It takes its effect out of the articles or deed of 1774, which created the power to make such an instrument, and was made in execution of such power. She takes notice, in the preamble of it, that she was a married woman, and that, as to what she was legally entitled to dispose of, her will

was as therein mentioned. It is usually called an appointment. A *feme covert* can execute an appointment over her own estate. Powell on Powers 34; 3 Atk. 712. The reason or ground of a wife's being disabled to make a will, is, from her being under the power of the husband, not from want of judgment, as in the case of an infant or idiot.

Matthew Henderson and his wife, before their marriage, agreed that her real estate should remain her property, and might be disposed of by will and testament, in writing, by her, as she should think fit, as absolutely as if the marriage had never been solemnized. The intention of the parties is plain, and admits of no doubt. She has accordingly disposed of it by an instrument, in nature of a will and testament, in execution of the power and by the express consent of the husband, not to him, or his relations, but amongst her own nearest of kin. No fraud, force, flattery or improper use of the power he had over her, as a husband, has been exerted, nor is it alleged. This will bar him from any title to her estate, and why should it not bar the heir-at-law, in equity and reason? Here was a fair and lawful agreement between them, founded on a valuable and meritorious consideration. Mrs. Henderson, with her husband, could, during the coverture, have given away her real estate by fine or deed (if she had been secretly examined, agreeable to the act of assembly of Pennsylvania), conformable to their agreement; and if he had refused to join with her, a court of equity (if such a court had existed here) would, on her application, have compelled him to carry their agreement into execution. It is a lamentable truth, that there is no court clothed with chancery powers, in Pennsylvania; but equity is part of our law, and it has been frequently *determined in the supreme court, that the judges will, to effectuate the intention of the parties, consider that as executed, which ought to have been done. This is also a rule in the court of chancery in England. Why may not her articles of agreement, or deed, of 1774, be considered as a covenant to stand seised of her real estate for the uses therein specially mentioned, and also to the use of her will or appointment? Marriage, which tends to join the blood, is one of the considerations held sufficient to validate such a conveyance. Why should she not have a right in equity, of disposing of her lands, as incident to her ownership? for, she is to be taken, as to the execution of this power, to be a *feme sole*. If the intention of the parties cannot take place, by this deed and appointment, in the common way of their operation, they may be considered good in some other way: The substance, and not the form, ought principally to be regarded. Why may not this case be considered, under all circumstances, of equal operation as a deed executed by the husband and wife, in her lifetime, to the use of the persons named in the appointment? The court of chancery will supply forms, where there is a meritorious consideration; it has gone as great lengths as is desired in the present case; and I am glad to find the last cited case determined there to be in point, "that there is no difference between a legal and equitable interest." Ambler 565; *Rippen* v. *Dawding*, or *Hawdin*, by Ld. Chancellor Camden, in 1769. The spirit of the case of *Wright* v. *Lord Cadogan et al.*, 6 Brown Par. Ca. 156, also implies this doctrine. [*203

From all the circumstances of this case, taken together, I am of opinion, that the appointment of Margaret Henderson, passes this estate in equity, and that judgment be given for the defendant.

SHIPPEN, Justice.—I concur in the opinion delivered by the Chief Justice. I confess, however, that I had considerable doubts when the case was argued; but Powell's new edition of Wood's Conveyancing 467–8, has removed them. Powell, the editor, states the doctrine to be now settled in England, according to the case of *Rippen* v. *Hawdin*. If so settled there, it certainly should be so settled here, where the alienation of real estate is much more favored.

YEATES, Justice.—If we sat merely as a court of law, I should be clearly in favor of the plaintiff. But the chancery maxim, to consider what ought to be done, as actually done, applies strongly to our judicial situation, having no court of equity to enforce the performance of contracts.

As to the right of a *feme covert*, under articles of agreement to devise, Ld. Kenyon, says, "what was once doubted is no longer so." The principles of *Rippen* v. *Hawding* are in some degree *impugned by the case of *Hodston* v. *Lloyd*, 2 Bro. C. C. 544, but *Rippen* v. *Hawding* now appears to be settled, since Powell, who, in his treatise on contracts, adds a *quere* to his account of the case, now states it as established. Since the statute of 27 *Hen. VIII.*, *c.* 10, I cannot see that solid distinction between a trust, and a legal estate, which would warrant us to draw a line on the present occasion. 2 Bl. Com. 233, 327.

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BRADFORD, Justice.—The legal estate is vested in the plaintiff. The defendants set up an equitable defence, relying on the articles, the consideration of those articles, and the devise in pursuance of them. As a will, the instrument is clearly void; but the question is not as to the formality of an appointment, but the creation of a power. The articles do not create a trust, nor expressly raise a power; but articles executory may, I think, create a power over real estate.

As to equity, the court has only a borrowed jurisdiction, from the want of a court of chancery; yet I think the constitution warrants our assuming it, from the expressions it employs. What is equitable, must, therefore, be adopted here; but it must be clearly settled to be so.

It has been urged, that the devisees are no nearer to the disposing party, than the plaintiff; the devisee is neither wife, child nor creditor; and that chancery will not interfere, except where conscience ought to oblige the party to give up a legal advantage. Upon this point *Wright* v. *Cadogan*, is distinguished from *Bramhall* v. *Hall;* and in *Compton* v. *Collinson*, the distinction is adverted to. But as I have already observed, the question is, as to the creation of the power; and that there was a sufficient consideration for creating it, in this case, cannot be doubted; for marriage has always been decreed to be sufficient.

Then, we are led to ask, are these articles executory? Did the husband engage to do anything to carry them into effect? In *Wright* v. *Cadogan*, the future husband covenanted to execute such deed as counsel should advise. It is not clearly stated in *Rippen* v. *Hawding*, whether the husband was, or was not, to do any act. In the case before us, he undertakes to do nothing; he only assents to his wife's making a will. The ultimate question thereupon is, does this assent, by removing that power which marriage legally vests in him over his wife's acts, confer upon her the power which by the articles she meant to reserve? And as the covenant is anterior, and

in consideration of the marriage, I am of opinion, that it does, and concur with my brethren in giving

Judgment for the defendants.

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*Dunrow v. Walker.[1] [*205

Descent.—Pre-emption right.

A pre-emption right, under the act of 21st December 1784, descends to the heirs-at-law as real estate.

By an act of assembly, passed the 21st of December 1874, §§ 9, 10 (2 Dall. Laws, 235), the right of pre-emption to lands lying between Lycoming creek on the east, and Pine creek on the west, &c., was secured to certain settlers and their legal representatives. A person of the name of Campbell, being a settler within the description of the act, died in 1781, before the act was passed. It appeared, that the heir at-law had sold the premises, part of the pre-emptive district, to the plaintiff, and the administrators of Campbell had sold them to the defendant; and both plaintiff and defendant had taken out warrants, within the limited time, though neither had obtained a patent. Hence, the question arose at the trial, and was reserved for the opinion of the court—whether, the right of pre-emption, granted in the terms of the act, should vest in the real, or the personal, representatives of the grantee?

After argument, The Court were of opinion, that by the words "legal representatives," heirs or alienees were to be understood; for, though the expression might, in the abstract, appear equivocal and ambiguous, it was explained by the subject-matter; and land, *ex vi termini*, importing *real* estate, the legal representative must, in legal contemplation, be the heir and not the administrator.

Judgment for the plaintiff accordingly.

Fitzalden v. Lee.[2]

Restitution.

On the reversal of a judgment, in ejectment between landlord and tenant, an award of restitution is in the sound discretion of the court; it is not *ex debito justitiæ*.

In error. The plaintiff and defendant having some controversy about a tract of land in Luzerne county, agreed to try the right to the possession in a summary manner, in the court of common pleas, and the proceedings were drawn up, as if it had been a plaint under the landlord and tenant act. (1 Dall. Laws, 617.) The jury having awarded possession to Lee (the defendant in error), judgment was rendered for him; and a writ of possession was issued, by virtue of which Fitzalden was turned out, and Lee put into possession. On error being brought, *Ingersoll* admitted that he could not support the judgment; but contended, that, as this proceeding was a matter of mutual consent and agreement, the court ought not to aid the plaintiff in error to get back the possession of the land.

The Court reversed the judgment.

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[1] s. c. 1 Yeates 213. [2] s. c. 1 Yeates, 160, 207.

*Afterwards, *Sergeant* moved for a writ of restitution; and urged, that it was a matter of right. 9 Vi9. 589–90. Restitution is of duty; but re-restitution is of grace.

Ingersoll replied, that restitution in this case was not *ex rigor juris;* and in the case of forcible entries, it arises only from an equitable construction of the statutes. 1 Hawk. 140, § 64, 65. This may be considered as a fair agreement, and though the court may not be able to sanction the form of the proceedings, they will equitably interpose to prevent injustice being done. They have exercised chancery powers, and one of the objects of chancery is to prevent the party from availing himself of an unjust advantage at law. Mitford, 103.

Sergeant insisted, that although this court adopted the principles of decision, they did not assume the powers, of the court of chancery.

By the Court.—Execution is of right; yet it may be, and every day is, withheld, on proper reasons being shown. The defendant is in possession under the *agreement* of the plaintiff, and it is fraudulent, for any man to attempt to overthrow his agreement in this manner. Under all the circumstances of the case, we do not think it proper to issue a writ of restitution.

Motion refused.

Roach *v.* Commonwealth.

State navy.

Under the resolution of the general assembly of 1779, the officers of the state navy were chargeable for clothing, &c., delivered to them, in that year, only at the rate of depreciation at the time it was delivered, according to the price before the war.

Such officers, who were honorably discharged, having accepted the commutation, were not entitled, under the resolution of 25th March 1784, to the previous arrears of half-pay.

Case. Pleas, *non assumpsit* and payment. The opinion of the judges was now delivered in this cause, the facts and principles involved in it, being stated by the chief justice as follows:

McKean, Chief Justice.—This action was tried by a jury, in last January term, and a verdict taken for the plaintiff, for 298*l.* 8*s.* 1*d.*; to wit, 41*l.* 8*s.* 1*d.* for an uniform suit of clothes, which he claimed as a grant in 1779, from the state; and 257*l.* for half-pay as a captain in the state navy, from February the 13th, 1781, until July the 1st, 1783, together with interest from the said 1st of July; subject to the opinion of the court on two questions stated.

1st. Whether clothing received by the plaintiff as an officer of the state navy, from the commonwealth, in consequence of a resolution of the legislature, passed on the 24th of March 1779; or in consequence of an act of the legislature, passed the 1st of March 1780, is to be debited to the plaintiff, or considered as a gratuity; and, if debited, at what price?

*207] *2d. Whether the plaintiff is entitled to half-pay from the time of his discharge, until the 1st of July 1783, and interest thereon from that day?

These questions have been argued by Messrs. *Ingersoll, Lewis* and *Ser-*

geant, for the plaintiff; and, Messrs. *Dallas* and *Wilcocks*, for the commonwealth; they have been considered by the court, and we shall now deliver our opinions.

The answer to the first question depends on the construction of a resolve of the general assembly, passed on the 5th of December 1778, in page 252 of the Journals of Assembly, published by M. Hillegas; which is, "that all such matters, as may appear to the council to be absolutely necessary to the comfort of the troops of this State, be sold to them for one-fourth part the original cost, for cash only, &c." And of another resolve of March the 13th, 1779, in page 337, which is, "that to every officer of the said troops, a complete suit of regimental uniform be furnished every year by this state, to be charged to the officer, at the price for which the said uniform might have been purchased at the commencement of the war, &c." And of an act of assembly, passed March the 1st, 1780, whereby a complete suit of uniform was directed to be given annually to each officer *gratis*, during the war.

Respecting this, there seems to have been a legislative construction. For, it appears in the Journals of the Assembly, pages 552 and 555, of the 14th and 18th of December 1780, that the legislature would not charge the officers with the clothes, &c., furnished them, at the specie price. From which it may be clearly inferred, the clothes that had been furnished them, were to be paid for in continental bills of credit only; and, under the second resolve before cited, the price was to be regulated by the price at the commencement of the war.

Without the aid of this authority, I should have been of opinion, that the clothes, thus furnished the officers, were to have been paid for in the continental bills of credit, and that this was the intention of the then assembly: Because, first, whatever might have been their *private* sentiments respecting these bills being depreciated, they deemed it inexpedient to acknowledge it in their *public* character. Secondly; because, continental money was then by law equal to specie, and it was penal to make a distinction between them. And lastly, because it is manifest, they intended to be generous to, or at least to relieve the known distresses of, the officers of the state, both in the army and navy. For, by the first resolve, the assembly directed, that the officers should be furnished with the articles necessary for them, at a fourth part of the then original cost, for cash only; and by the second, they were to be furnished with a complete suit of regimental uniform, at the price for which it *might have been purchased at the commencement [*208 of the war, intending thereby a further gratification; which, at first view, may appear paradoxical. Afterwards, by an act of assembly, a complete suit of uniform (the particulars of which are specified in the 8th section) was allowed to be given annually to each officer *gratis*, during the war. Let it be assumed, for illustration, that a complete suit of uniform, at the original cost on the 5th of December 1778, would amount to 240*l.* continental money; the officer for this was to pay a fourth part, or 60*l.* The depreciation of the continental money having been since fixed by law to have been on that day six for one, the specie price to be paid by the officer would be 10*l.* On the 13th of March 1779, the same specie price at the commencement of the war being allowed, for a complete suit of uniform, to wit, 40*l.* the officer was to pay that sum in continental money, which according to the same scale fixed by law, would amount only to 3*l.* 6*s.* 8*d.*, the depreciation

then being twelve for one. As to this point, therefore, I think, if the plaintiff is to be debited at all, it can be only for this last sum, or in that proportion.

With respect to the second question, it appears to me, to be involved in obscurity and doubt; but in such a case, I shall conceive it less injurious to err (if I do err) in favor of the individual, than of the commonwealth; because the error against the individual may be very distressing; whereas, if against the commonwealth, it will hardly be felt; and I know I must contribute my proportion of the money awarded.

It seems to be unnecessary to cite the several resolves of congress, allowing half-pay to the officers of the army of the United States, or of the assembly of Pennsylvania, on the same subject, respecting the troops of the state, as the principal ground on which our present decision must stand in the act of assembly, entitled, "An act for the more effectual supply and honorable reward of the Pennsylvania troops, in the service of the United States of America," passed the 1st of March 1780. In the 15th section, it is enacted, "That the officers, &c., of the navy of this state, who were in service on the 13th March 1779, and shall continue therein until the end of the present war, or until honorably discharged, shall be entitled to the allowances and benefits hereinbefore granted to the military officers, &c., respectively, of the Pennsylvania troops, as to half-pay and clothing; and to the like supply and distribution of the articles above enumerated, subject to the same limitations and conditions; the half-pay of the officers of the navy to commence at the expiration of the present war, or their discharge." And the resolve of the assembly, of the 25th of March 1784, is in these words, "Re-
*209] solved, that as one of the designs in granting half-*pay to the said navy officers was to place them on a footing with the officers of the army, that the officers of the navy of this state, entitled to half-pay for life, under the resolutions of the 24th of March 1779, and confirmed by act of assembly, passed the 1st of March 1780, be allowed five years' full pay in lieu thereof, to be paid at the same time, and in the same manner, that the officers of the army, in the line of this state, are or shall be paid, and that their accounts be liquidated and settled by the comptroller-general, and certificates given them."

From the foregoing, it appears, that a distinction has been made, as to the time when the half-pay should commence, between the officers of the army in the line of this state, and those of the state navy; the half-pay of the former is confined to such of them as should continue in the service of the United States during the war, and was to commence at the conclusion of the war; but that of the latter was to commence at the time of their discharge from service. The plaintiff was honorably discharged from service on the 13th of February 1781, and was incontestably entitled to half-pay from that time, until the 25th of March 1774, when he commuted his half-pay for life, for five years' full pay. The sole question then is—whether this act of commutation has barred the recovery of the half-pay then due to him, to wit, for three years, one month and twelve days, as well as his future half-pay.

It has been contended, for the commonwealth, that his accepting a certificate for five years' full pay, is a bar to the arrearages; for that by a resolve of congress of the 22d of March 1773, adopted by the assembly on the

22d of September 1773, it is directed, "that, with respect to retiring officers, entitled to half-pay for life, the commutation, if accepted by them, shall be in lieu of whatever may be now due to them, since the time of their retiring from service." On this, the whole difficulty respecting the plaintiff's claim rests.

In answer, it has been asserted (and acceded to), that the plaintiff, at the time he received his certificate from the comptroller-general, as well as the other navy officers, gave him notice that they meant not thereby to relinquish the arrears of half-pay then due to them, respectively; and it was further contended, that the last-mentioned resolves did not relate to the officers of the state navy of Pennsylvania, but to the officers of the army, in the service of the United States only.

It appears to me, that the clause in the resolve of the 22d of September 1773, relates to *retiring* officers of the army, and that the navy of the state of Pennsylvania was not all then in the contemplation of the congress, or assembly. Besides, none of the officers of the state navy had retired; but the plaintiff and four or five others had been honorably discharged from the service *by the supreme executive council of Pennsylvania. Who the [*210 retiring officers of the army were, I do not well know; perhaps, those who became supernumerary, or reduced, in consequence of the resolve of congress of the 21st of October 1770, or such as had retired, with the consent of the commander in chief, after notice of the provisionary articles of peace, of the 30th of November 1772. And it is at least doubtful, whether the half-pay of these officers was to commence before the conclusion of the war; for those who continued to undergo the fatigues and hardships of a camp, and to endanger their lives in battle, until the termination of the war, seemed to have a greater claim on their country, than those who retired from the service; and of this opinion was the congress, which appears in their resolve on General Maxwell's case, on the 8th of August 1780. The words in the resolve, regarding reduced officers, of the 21st of October 1780, are, that they "are to be allowed half-pay for life;" but no mention is made of the time when it was to begin, nor did the congress make any provision for the payment of it, prior to the conclusion of the war. Be this as it may, it is certain, that no officers of the army in the line of the state, were entitled to half-pay, by any act or resolve of the assembly, excepting such as should serve until the end of the war, and that those in their navy were entitled to it from the time of their discharge. The navy officers could not be placed on a footing with the officers of the army of the state, if the latter got five years' full pay, in lieu of what was to become due to them for half-pay from the end of the war, and the former got only five years' full pay, in the lieu of what was to become due to them, but also of several years of arrears then past, for the payment of which they had a legislative security. Besides, the officers of the army had large bounties in lands, not only from the state, but also from the United States; but the officers of the state navy had none. Could this have been the intention of the legislature? I should think not, because of the great inequality it would create, not only between their officers in the land-service and sea-service, contrary to their express declaration, but also between the latter themselves; for by accepting the commutation, the one would lose more than another, in proportion to the times they were respectively discharged. This would be so unreasonable and unjust,

that unless they had expressly and manifestly thus declared, I am inclined to entertain a contrary sentiment. Their design rather appears to have been, to place their navy-officers on a footing with the most favored of their land-officers, because they expressly allowed them half-pay, from the time of their discharge; but to the others, only from the end of the war. It is a pity this *211] affair has been left so embarrassed; but the best conclusion *I can form, upon the whole, is in favor of the plaintiff, on this question also.

SHIPPEN and YEATES, Justices, concurred with the Chief Justice in the first point; but differed from him in the second point.

BRADFORD, Justice, concurred with the Chief Justice in both points.

WALKER *et al.* *v.* GIBBS *et al.*, garnishees.[1]

Foreign attachment.— Verdict.

A debt, payable *in futuro*, may be attached, by writ of foreign attachment.
A verdict will be so construed, as to effectuate the plain intention of the jury.

A FOREIGN ATTACHMENT issued in the common pleas of Philadelphia, returnable to March term 1788, at the suit of the plaintiffs, against Joseph Waldo, and the defendants were summoned as garnishees. Judgment being entered at the third term, a writ of inquiry was executed, and the sum of 3778*l.* 9*s.* 9*d.* was found in damages. A *scire facias* was, thereupon, issued against the garnishees, returnable to March term 1789; but the cause was removed into this court, by a writ of *certiorari*, returnable to July term 1789; and was tried on the 24th of September 1790; when the jury found a verdict for the plaintiffs for 1204*l.* 12*s.* 4½*d.*; and at the instance of their counsel, added the following words at the bar, which the court directed to be entered in the record—" being exclusive of certain outstanding debts, and exclusive also of a bond for 10,000*l.* from the garnishees to Waldo, dated the 17th of November 1786, and payable the 17th of November 1790;" which bond was admitted in the garnishees' answers to interrogatories filed by the plaintiff. On this verdict, judgment was entered, generally; and, the time for paying the bond having elapsed a *scire facias*, returnable to January term 1792, was issued upon the judgment, requiring the garnishees to show cause why execution should not issue for the amount.

The questions arising upon these facts were submitted to the court, upon a motion to quash the *scire facias*, which was argued by *Coxe*, *Rawle* and *Dallas*, for the garnishees; and by *Ingersoll*, *Lewis* and *McKean*, for the plaintiffs.

For the *garnishees*, it was contended, 1st. That no verdict or judgment had been given for the bond; in respect to that, as well as to the outstanding debts, the language is exclusive; and what is excluded cannot be included. Where there is no verdict, there can be no judgment; for the consideration of the court is on the finding of the jury: a judgment must be warranted by the verdict. A verdict is void in all cases where it finds the matter in issue, by

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[1] s. c. 1 Yeates 255.

way of argument. 5 Com. Dig. *tit. Pleader, § 22. 2d. That the bond, not being due, could not be attached. 3 Leon. 236; Roll. Abr. 553, pl. 2; Cro. Eliz. 713; 7 Vin. Abr. 229, pl. 2, 3, 4. 7 Ibid. 169, 189. 3d. That the *scire facias* ought to have been brought upon the original judgment in the common pleas, and not upon the judgment in this court. Style Pr. Reg. 573, 5, 6, 8; 4 Bac. Abr. tit. Scire Facias, § 1; Hob. 280.

For the *plaintiffs*, it was answered: 1st. That if the verdict was informal, the court could mould it into form, from the materials placed by the jury on the record. 1 Dall. 462; Hob. 54; 2 Burr. 699; 3 T. R. 749, 349; Doug. 121. 2d. That, from the uniform practice under the act of assembly (1 Dall. Laws 60), as well as from the authorities under the custom of London, debts payable at a future day might be attached. 3 Lev. 236; Vin Abr.; 1 Sid. 327; 1 Bac. Abr. 691; 1 Roll. Abr. 553; 2 Daw. 316. 3d. That the jurisdiction was recognised by the act which provides for the garnishees answering interrogatories. 2 Dall. Laws 734.

By the Court.—This *scire facias* is issued to revive and effectuate a judgment obtained in this court; and therefore, is regularly instituted here. It is true, that a bond is assignable in Pennsylvania; but if the bond in question had been actually assigned, the fact might have been pleaded to the former *scire facias*. As to the question, whether the debt was liable to attachment, we have no doubt. It was *debitum in presenti, solvendum in futuro:* and it has been the uniform construction of the act of assembly, that such debts were affected by the attachment.

It must be allowed, that the judgment is, in some degree, informally entered; but we can have no difficulty in fixing the meaning of the jury, though their verdict might have been better expressed. The fact, indeed, being admitted in the answers of the garnishees to the interrogatories, judgment would have been given, on motion; and of course, on all the facts now stated, we are equally competent to decide.

Let judgment be entered for the plaintiffs.

APRIL TERM, 1793.

*Upper Dublin v. Germantown.[1] [*213

Order of removal.

A justice cannot join in making an order of removal from his own township.[2]

Two Justices made an order, removing Rachel Peters, as a pauper, from Germantown to Upper Dublin. On appeal, the quarter sessions of Philadelphia county confirmed the order. It was brought into this court, by *certiorari;* and the fact upon which Upper Dublin relied, was, that the two

[1] S. C. 1 Yeates 250.

[2] Washington v. Beaver, 3 W. & S. 548; McVeytown v. Union Township, 5 Id. 284; Bradford v. Keating, 27 Penn. St. 275; Ross Township : Clover Township, 32 Leg. Int 449.

justices, at the time the order was made, were inhabitants of, and ratable and contributary to the poor-tax of Germantown.

Upon argument by *Rawle*, for Upper Dublin, and *Ingersoll*, for Germantown, THE COURT, unanimously, quashed the order of sessions, and the order of the two justices.

STANSBURY *v.* MARKS.

Witness.

A Jew may be fined for refusing to testify on his Sabbath.

IN this cause (which was tried on Saturday, the 5th of April), the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The court, therefore, fined him 10*l.*; but the defendant, afterwards, waiving the benefit of his testimony, he was discharged from the fine.

SHOEMAKER, assignee, *v.* KEELY.[1]

Assignment in bankruptcy.

An assignment in bankruptcy does not pass a cause of action arising in *tort*.

THIS was an action on the case, for deceiving the bankrupt in the sale of a quantity of claret; and the question submitted for decision to the court was—whether such an action could be maintained by the assignee?

The defendant's counsel (*Rawle*) observed, that the bankrupt was really indebted to his client; but that in this form of action, he would be deprived of the advantage of a set-off; and he contended, that the action would not lie. The 7th section of the bankrupt act (2 Dall. Laws, 371) gives to the commissioners a power only "to assign or dispose of all the debts due to, and for the benefit of, the bankrupt," &c. *Debts*, emphatically, *and *214] nothing else, pass under this power; goods and chattels passing under the general statutory assignment; and the remedy for a *tort* is not, in its nature, assignable. Doug. 101, 562; Co. 222, 228; 2 Vern. 98.

The plaintiff's counsel (*M. Levy*) answered, that this was not an action brought against the bankrupt, or the commissioners; and that it ought to be sustained, upon the same principle, which authorised such an action to be brought by executors or administrators (who are assignees of the deceased), though it could not be brought against them. Thus, likewise, though a *chose in action* is not assignable at law, it goes to executors. Cowp. 373; 2 Bl. Com. 389, 485. The statutes of bankruptcy were framed to ameliorate the condition of creditors; and it is obvious, that every right and interest of the bankrupt, even a mere possibility, is transferred. 3 P. Wms. 132; Co. B. L. in App. 45–6.

BY THE COURT.—It is plain, that the action, in its present form, cannot be supported. Under the act of assembly, nothing but debts are assigned, or assignable; and *torts* must be considered as the mere personal concern of the bankrupt.

Let judgment be entered for the defendant.

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[1] s. c. 1 Yeates 245.

Fox's Lessee *v.* Palmer *et al.* (*a*)

Competency of witness.

A subscribing witness is competent to prove that a deed was executed on a different day from that of its date.

On the trial of this ejectment, the subscribing witnesses were offered to prove, that a deed, bearing date the 1st of April 1784, was not, in fact, executed until the month of November following. It was objected, that such proof would contradict the attestation of the witnesses themselves. 4 Burr. 2224 ; 2 Esp. 164.

By the Court.—A subscribing witness attests nothing but the sealing and delivery of the deed : the date is a matter which he does not attest, and to which he seldom attends. By the rules of the common law, the subscribing witnesses should be produced by the plaintiff, to prove the execution of the deed; and surely, it would be then competent to the defendant, to cross-examine them, as to the real time of the delivery. But even if they were called to contradict their own previous attestation, the exception rather applies to their credit, than to their competency.

The objection overruled.

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*Fitzgerald *v.* Caldwell.[1] [*215

Foreign attachment.—Interest.

A foreign attachment, generally, suspends the running of interest between the garnishee and the debtor.

This suit was instituted by the plaintiff, for the use of Moore & Johnson, against Andrew Caldwell, the surviving partner of Andrew and James Caldwell. Vance, Caldwell & Vance, had assigned to Moore & Johnson, a debt due to them from Andrew and James Caldwell, and those assignees employed the plaintiff as their agent to recover the amount. The defendant, accordingly, gave Fitzgerald a note, dated the 8th of April 1782, for 5009*l.* 5*s.* 1*d.*, "provided so much appeared due to Vance & Co. on a settlement of accounts." The matter in dispute was agreed to be referred; and the referees reported, "that there was a sum of 4016*l.* 19*s.* 4*d.* due, on the 8th of April 1782, from Andrew and James Caldwell, to Robert Vance, surviving partner &c.; and further, that there was a sum of 5009*l.* 5*s.* 1*d.* due from the defendant to the plaintiff, on a note from Andrew and James Caldwell, to the plaintiff, dated the 8th of April 1782." Upon this report, judgment *nisi* was entered; and afterwards, it was agreed, "that the judgment so entered should be absolute; but that it should wait the trial of certain foreign attachments (which had been laid, before the commencement of this suit, by supposed creditors of Vance & Co., upon their effects in the hands of the defendant), and that if anything should be recovered thereon against Andrew

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(*a*) This ejectment was tried at York-town *nisi prius*, on the 24th May 1793, before Shippen and Bradford, Justices.

[1] s. c. 1 Yeates 274.

Caldwell, the same should be defalked out of the said sum for which judgment was rendered, and execution issue for the residue only." It appeared, that the attachments in question had been laid by the defendant himself, in the name of another person and without any authority, but what might be inferred from a general correspondence; and in one instance, an issue being formed and tried, on the plea of *nulla bona*, the verdict was in favor of the garnishee.

On the 9th of April 1793, the defendant's counsel (*Sergeant*, *Ingersoll* and *McKean*) moved to stay further proceedings, upon payment of the principal sum found due by the referees, and costs. The motion was opposed by *Tilghman*, *Wilcocks* and *Lewis*, for the plaintiff; who contended, that under the circumstances of this case, interest ought to be allowed.

McKean, Chief Justice.—It is clearly the general rule, that a garnishee is not liable for interest, while he is restrained from the payment of his debt, by the legal operation of a foreign attachment. But it is said by the plaintiff's counsel, and I assent to the proposition, that if there is any fraud or collusion; nay, if there is any unreasonable delay occasioned by the conduct *of the garnishee himself, such cases will form exceptions to the general rule. In the present instance, however, there is no proof of fraud or collusion; nor of any wilful procrastination on the part of the garnishee; and fraud can never be presumed. It is true, likewise, that no express authority was given for laying the attachments; but an implied authority appears in the correspondence that has been produced: and the defendant is not answerable for the event. I am, therefore, of opinion, that interest ought not to be allowed.

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Shippen, Justice.—Evidence will often strike different minds in a different manner. It does not appear to me, that there was sufficient authority for instituting the foreign attachment; but, on the contrary, that it was done officiously, and at the instance of the garnishee himself. I should, consequently, think it just, on this occasion, to allow the claim of interest; but the majority of the court will sanction a different decision.

Yeates, Justice.—I concur, generally, in the opinion expressed by the Chief Justice, that there is not sufficient ground to except the present case from the operation of the general rule.

Bradford, Justice.—As I was originally counsel in this cause, I forbear taking any part in the decision.

By the Court.—It is awarded, that the defendant be discharged, upon payment of the principal sum recovered, with costs.(*a*)

(*a*) A writ of error was brought by the plaintiff; and on the 18th of July 1793, the high court of errors and appeals delivered the following judgment.

By the Court—After making consideration and due deliberation, it is considered by the court here—1st. That the last judgment or decretal order of the supreme court "That Andrew Caldwell shall be discharged from the said judgment, on the payment of 4016*l.* 9*s.* 4*d.*, to wit, the principal sum found due to Vance, Caldwell & Vance, by the second report of the referees, and all costs of suit," be reversed. 2d. That the judgment in the supreme court, rendered in the term of January 1791, in favor of George

JANUARY TERM, 1794.

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*VANCE, surviving partner, v. FAIRIS.[1]

Evidence—Book-entries.

A book, some of the entries in which were made a considerable time after the transactions took place, and which are not distinguished from the regular entries, is inadmissible.

ON the trial of this cause, the plaintiff, who was surviving partner of a commercial house established in Dominica, offered in evidence, a copy of entries in original books of the company, sworn to be truly transcribed. The witness premised, however, that the dates would, by no means, ascertain the exact period at which the transactions arose between the parties, as the entries were not made in the waste-book, for months afterwards. The defendant's counsel, thereupon objected to the admission of the evidence.

The counsel for the plaintiff stated, that their clients had, in fact, been engaged, during the late war, in an illicit trade with America, and that the defendant was their agent; that, therefore, it had been necessary to give a color to their transactions, and that they had not dared to make many of the entries at the time the facts occurred: but it was contended, that as the declaration of the witness did not go to all the items; as he does not specify any that are exceptionable, and as some are unquestionably proper to be laid before the jury, the objection to the evidence can only apply to its credibility, and not to its competency.

BY THE COURT.—It does not even appear, that the clerk who made the entries, was in the service of the plaintiff, at the time the transactions took place; nor does any witness substantiate the transactions themselves, upon oath. We are always inclined to be liberal in the admission of evidence upon commercial controversies; but to establish a book, or the copies of entries in a book, kept under such circumstances, would be giving too great a latitude for deception; and, if drawn into precedent, might prove a pernicious innovation upon the rules of law. The evidence cannot, therefore, be received.

Fitzgerald, the plaintiff in error, for the sum of 5009*l.* 5*s.* 1*d.* with the costs of suit, and by agreement of the parties, stated in the record, made absolute in January term 1792, be and the same is hereby, according to the terms of the said agreement, affirmed and made stable. The record was therepon remitted to the supreme court.[2]

[1] s. c. 1 Yeates 321.

[2] Also reported in Addison 119. See a further decision in this case, 4 Dall. 251; 1 Yeates 274.

WARD v. HALLAM.[1]

Statute of Limitations.

The words, "beyond sea," in the act of 1713, mean out of the limits of the United States.[2]

THE plaintiff was a citizen of, and resident in, South Carolina, and the defendant was a citizen of, and resident in, Pennsylvania, for six years before the present action (founded upon *a promissory note) was *218] commenced. The statute of limitations being pleaded, judgment was confessed for the plaintiff, subject to the opinion of the court, whether, under the circumstances of the case, the plea in bar was sufficient?

The point was argued, on the 9th of April 1793, by *Rawle*, for the plaintiff, and *Dallas*, for the defendant.

In *support* of the plea, it was contended, that the exception in favor of absentees, contained in the last section of the act of Pennsylvania (1 Dall. Laws 97), obviously extended only to the case of creditors *beyond sea;* for it is to their case expressly, that the words "returning into this province," are applied. So, in the construction of the statute of 21 *Jac. I., c.* 16, respecting absent creditors, and the act of 4 & 5 *Ann., c.* 16, respecting absent debtors, the exception has always been confined to persons *absent beyond seas;* and Scotland has been adjudged not to be within the statute. Espinasse, 153; 1 Bl. Rep. 286. The several American provinces, before the revolution, were as nearly connected, under the same sovereign, as England and Scotland; since the revolution, they form one nation; it would be a geographical absurdity, to consider an inhabitant of South Carolina to be beyond the seas, in relation to Pennsylvania; and it would be a political absurdity, to consider him, in the phraseology of some English books, to be in foreign parts. If an inhabitant of South Carolina is to be regarded in either light, so must an inhabitant of Delaware or New Jersey.

It was answered, for the *plaintiff*, that, in the general opinion, the act of limitations had never been supposed to operate against persons who were out of the state, whether they resided in any other part of America, or were actually beyond sea. The act of Pennsylvania is subsequent in date to the English statutes on the same subject; and conforms to the 21 *Jac. I.*, except that the 21 *Jac. I.*, speaks of returning from beyond seas, while the act speaks of returning into this province. The words "beyond seas," however, will be found to have been adopted as a general substitute for the words "out of the realm," from the time that the two kingdoms of England and Scotland, became united under one king. To consider those words in our code, in a strict geographical sense, would render them extravagant, and in many cases useless; for a man might reside at Lima, or Cape Horn, and yet be within the operation of the act. Besides, the legislature of Pennsylvania has no political or moral right, to make laws to bind persons who are out of her jurisdiction.

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[1] S. C. 1 Yeates 329.

[2] Thurston v. Fisher, 9 S. & R. 288; S. P. Kline v. Kline, 20 Penn. St. 503; Gonder v. Estabrook, 33 Id. 374. But see Murray v. Baker, 3 Wheat. 541; Shelby v. Guy, 11 Id. 361; Bank of Alexandria v. Dyer, 14 Pet. 14.

After the argument, the COURT declared a desire to obtain some information, as to the practice of other states on the subject; *and kept the cause under advisement for that purpose, until the present term; when they gave judgment for the defendant, as in the case of a nonsuit. [*219

Judgment for the defendant.

INGRAHAM v. GIBBS.

Verdict.

THE jury brought in their verdict in dollars, and the court ordered it to be so recorded. (*a*)

FULLER v. MCCALL.[1]

Marine insurance.—Abandonment.

When the voyage is lost, though the cargo insured be not damaged to one-half its value, the assured may abandon, and claim for a total loss.

In case of a constructive total loss, the assured must abandon, without unnecessary delay, after receiving notice thereof, and the abandonment must be unconditional.

THIS was an action on a policy of insurance, upon the cargo of the sloop Mary, William Southern, master, at and from Philadelphia to Trinidad, in which the plaintiff declared against the defendant, one of the underwriters, as for a total loss.

On the trial, the following facts appeared: The plaintiff having shipped goods on board the sloop, to the invoice amount of 931*l.*, she sailed from Philadelphia, on the 5th of May 1789, and soon afterwards, encountered a gale of wind, during which she sprung a leak, that obliged her, on the 20th of June, to make St. Bartholomews, the nearest port. A survey was there immediately had upon the sloop, which was found incapable of continuing longer at sea; and also on the cargo, which proved to be very much damaged; and on the 3d, 7th, 20th and 27th of July, N. Dawes, of St. Bartholomews, communicated these circumstances, by letters, to the plaintiff, and further informed him, that as the cargo was not fit to be reshipped, it had been sold for 3067 pieces of eight, which (together with the account sales) N. Dawes sent in specie, by Capt. Southern, to the plaintiff. When the first account of the sloop's putting into St. Bartholomews arrived at Philadelphia (on the 23d of July), the plaintiff was at Cape May; but his clerk (who had general instructions to transact his business) opened Mr. Dawes's first letter, and by the instructions of Mr. Fisher, whom the plaintiff had directed him to consult, he showed it to the defendant, and to such other of the underwriters as were in the city, on the day it was received, or on the ensuing day. These gentlemen expressed no opinion upon the occasion; but the clerk, by the advice of Mr. Fisher, opened a policy upon the return-cargo, for the benefit of whom it might concern, and the former underwriters *were first offered the choice of also underwriting this policy. On the 28th [*220

(*a*) This, I believe, is the first instance of a judicial compensation in dollars, in the state courts of Pennsylvania.

[1] s. c. 1 Yeates 464.

of July, the plaintiff came back to the city, and approved what his clerk had done. On the 29th of July, Captain Southern arrived, in the sloop, at Philadelphia, bringing with him Mr. Dawes's last dispatches, but no money. The plaintiff thereupon called a meeting of all the underwriters, submitted the facts and papers to them; made a verbal claim as for a total loss, and it was agreed, on all hands, that without prejudice to either party, Capt. Southern should be arrested, to compel him to account for the money. It was not, however, until the 6th of November 1789, that the plaintiff addressed a letter to the underwriters, making a formal abandonment of all the property in the sloop; and on the same day, they answered, that they did not think it proper to accept the abandonment, but offered to pay an average loss.

Upon these facts, a verdict was taken for the plaintiff, subject to the opinion of the court, whether they established a total, or an average, loss?

On the argument, however, two positions were asserted, by the *defendant's* counsel: 1st. That the circumstances of the case did not warrant an abandonment, as for a total loss: and 2d. That even if the plaintiff had a right so to abandon, he had not exercised that right in due time.

On the first position, they had stated the general doctrine to be clearly established, that the owner of goods cannot abandon, unless, at some period or other of the voyage, there has been a total loss; and where the loss is not an absolute destruction of the property, an abandonment will not be allowed, unless the damage amounts to a moiety of the value. Park, Ins. 164, 165. 188. This was not the fact, in the present instance; the goods were not destroyed; they were not damaged to near the amount of a moiety of their value; nor can it be said, that the voyage was defeated, since the sloop, by returning to Philadelphia, has proved that she might have gone to Trinidad, where the superior price would have compensated for every expense. What, indeed, constitutes the defeating of a voyage, must depend on the circumstances of each case; and notwithstanding the generality of the expression in Park 164, it will be found, that when he, as well as other writers on the subject, enters into an exemplification of the rule, it is done by specifying instances of a total loss of the vessel, by tempest, capture or decay, and by instances of a total destruction of the cargo, or, at least, of such damage, as does not leave sufficient to defray the expense of repair, &c. Park, Ins. 165, 174, 176, 187, 189.

On the second position, they urged, that the abandonment was neither complete, nor in time. The indulgence allowed, under any circumstances, to *221] the insured, to convert a partial into a *total loss, is a great one, and ought to be fairly merited by a candid and explicit conduct: to observe a cautious silence, in expectation of events, is not the characteristic of such conduct. The insured has, unquestionably, a right to say, in all cases, that he will not abandon; while he remains silent, he cannot be presumed to have abandoned; it is a matter of election on his part, and he must do some act, in due time, in order to manifest his election. In short, he must, unequivocally, and on the first opportunity, after information of the loss, abandon the whole property, before he can recover for a total loss. Park, Ins. 161, 162; 1 T. R. 615, 613; Doug. 220; 2 Burr. 1119; 1 T. R. 608; 2 Ibid. 407. In the present case, there was no positive act of abandonment, until the 8th of November 1789; the communication made by the plaintiff's clerk to

the underwriters, was unaccompanied with any declaration of abandonment, and the same communication would have been made, whether a partial, or a total loss, is claimed; and the claim for a total loss made by the plaintiff, after the return of Captain Southern, and without any abandonment of property, was clearly irregular and inoperative. Besides, the second policy was opened for the benefit of whom it might concern, by the express advice of the plaintiff's agent; at that time, therefore, he did not choose to make an election; and as there was no moment, previous to the 6th of November, when any act was done by him to vest the property in the insurers, they could have no interest in it, at the time of the loss, and therefore, could derive no indemnity from the second policy. 1 Burr. 490–7; 1 Wils. 10. The acts of Fisher were the acts of the plaintiff's agent, approved by, and obligatory upon him. 1 T. R. 115, 116; 2 Ibid. 189, in note.

For the *plaintiff*, it was premised, on the first position, that this was an undertaking by the underwriters, that the cargo of the sloop Mary should be safely carried to Trinidad; and if it does not arrive at the destined port, they undertake to pay the value insured. It is also a natural construction of the contract, that if the voyage is defeated, though there is no destruction of the ship or cargo, the underwriters must answer as for a total loss; and the principle is recognised and exemplified by a variety of authorities in the most unqualified terms. Park, Ins. 164–5–7, 174–5–6, 180–7–9; 1 T. R. 191, 615. The plaintiff had a right to have his goods carried to Trinidad; and that they were not carried thither, is an incontestible proof that the voyage was defeated. It is true, that the sloop was not totally wrecked, nor the cargo totally destroyed; but the surveys show, that both were in such a condition, as to render it not worth while to prosecute the voyage, and that is a sufficient *ground, agreeable to the authorities cited, upon which the insured may abandon, and convert a partial into a total loss. [*222

On the second position, the plaintiff's counsel admitted, that the insured must make and declare his election to abandon, within a reasonable time after knowledge of the loss; but they urged, that what constitutes a reasonable time has never been specifically defined; it must depend on the particular circumstances of each case; and it has been said to be something like notice on bills of exchange. Park, Ins. 92, 192–3; 1 T. R. 616, 614. The communications made to the underwriters, during the absence of the plaintiff, were as prompt as could be exacted; and his approbation of the conduct of his clerk, cannot certainly be considered as a waiver of his right of abandonment. It was reasonable for him to wait, until he knew the issue of the sales at St. Bartholomews, before he exercised that right; and in the precaution of opening the second policy (which it was insisted would be valid, whether the plaintiff, or the underwriters, should ultimately be deemed interested in the property), he acted with candor and prudence. But the moment Captain Southern arrived, the plaintiff claimed as for a total loss; and though the underwriters refused to admit the claim, they co-operated with him in the subsequent measures to recover the money: he steered a middle course, for their mutual benefit, and shall not be prejudiced by it. 2 T. R 407; Park, Ins. 173. It is true, the authority says, that "unless the owner does some *act* signifying the intention to abandon, it is only a partial loss" (1 T. R. 615), but the early claim for a total loss was a sufficient manifesta-

tion of the plaintiff's intention; and no form of abandonment is prescribed by any law or authority extant. The plaintiff's conduct, on the 29th of July, was tantamount to an abandonment; but even if the formal act of the 6th of November was necessary, it will be remembered, that the underwriters have suffered no inconvenience or injury, by the delay.

THE COURT, on the 24th of January 1794, delivered their opinion, "that the plaintiff cannot recover in this action, as for a total loss;"[1] and judgment *nisi* was, thereupon, entered for the defendant.(*a*)

E. Tilghman and *Lewis*, for the plaintiff. *Ingersoll* and *M. Levy*, for the defendant.

JANUARY TERM, 1795.

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*223] *LLOYD'S Lessee *v.* TAYLOR.[2]

Execution of power of sale.

When a testator directs his lands to be sold, and the proceeds distributed, but appoints no one to execute the power, a sale by the surviving executor is valid.

THE question in this case arose upon a devise, that after the death of the testator's wife, certain lands should be sold, and the money divided among children; but the will did not declare by whom the sale should be made. The land was sold, however, by the survivor of two executors; and it was submitted for the opinion of the court, whether that sale was good, the plaintiff's counsel citing the following authorities in support of it: Dyer 371; Hard. 419; 1 Ch. Ca. 179; 2 Leon. 320; Shep. 449; Sir T. Jones 25; Savil. 72; 3 P. Wms. 92; 1 Atk. 420.

BY THE COURT.—It is a plain case. Let judgment be entered for the plaintiff.

Rawle, for the plaintiff. *Bankson*, for the defendant.

(*a*) A motion, on behalf of the plaintiff, was made and granted, for re-argument, which took place on the 10th of September 1794.

THE COURT, however, adhered to their former opinion; and on the 22d of January 1795, gave —

Judgment for the defendant.

[1] The opinion of the Chief Justice, embracing the two resolutions stated in the head-note, will be found in 1 Yeates 470. The rule, that when a voyage is defeated, the insured may abandon, and recover for a total loss, is a sound one, when applied to the subject insured. Goold *v.* Shaw, 1 Johns. Cas. 293. Thus, Judge STORY says, in Bradlie *v.* Maryland Ins. Co., 12 Pet. 401, that "a total loss of cargo may be effected, not merely by the destruction of that cargo, but by a permanent incapacity of the ship to perform the voyage—that is, a destruction of the contemplated adventure." s. p. Columbian Ins. Co. *v.* Catlet, 12 Wheat. 383; Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220. But a technical total loss of the cargo, will not authorise an abandonment of the vessel, if she might have been repaired for less than half her value, so as to have been competent to prosecute her intended voyage, though the voyage be actually broken up by the loss of the cargo. Goold *v.* Shaw, *ut supra;* Alexander *v.* Baltimore Ins. Co., 4 Cr. 370; Bradlie *v.* Maryland Ins. Co., 12 Pet. 378. And if the voyage be broken up by fear of an anticipated peril only, this does not amount to a technical total loss of the cargo. Smith *v.* Universal Ins. Co., 6 Wheat. 176.

[2] s. c. 1 Yeates 422.

HUMPHREY'S Lessee *v.* HUMPHRIES.[1]

Execution.

A vested remainder in tail may be taken in execution, and sold by the sheriff.

IT was adjudged, after argument, in this case, that a vested remainder in tail may be taken in execution, and sold by the sheriff.

Wilcocks and *Thomas*, for the plaintiff. *Rawle*, *M. Levy* and *McKean*, for the defendant.

JOYCE *v.* SIMS.[2]

Responsibility of agent.

The consignee of a ship is not personally liable to a shipper, for a breaking up of the voyage, without his fault—the shipper having had knowledge of the foreign ownership of the vessel.

THE defendant advertised a ship for freight to Madeira. The plaintiff shipped flour on board; after which, and before the ship sailed, a third person attached her for a debt due to him from Pintard, the owner of the vessel, for whom the defendant acted as agent. The voyage was, by this means, broken up, and the plaintiff's flour, being re-landed, was sold at a loss.

*It was ruled, BY THE COURT, that the defendant (the agent) was not answerable for the damages sustained by the plaintiff. [*224

Heatly, for the plaintiff. *Wilcocks* and *Rawle*, for the defendant.

APRIL TERM, 1795.

REPUBLICA *v.* The GUARDIANS of the POOR of PHILADELPHIA.[3]

Mandamus.

A *mandamus* will not lie, to control a discretion vested in a public board.[4]

THIS was a motion for a *mandamus*, commanding the defendants to proceed to another election of the managers of the House of Employment. By the act of assembly, passed the 25th of March 1782 (2 Dall. Laws 17), it was declared, that "the guardians of the poor in the city of Philadelphia shall, half-yearly, appoint six of their number, to superintend the alms-house and house of employment;" and it was agreed, in point of fact, that the guardians of the poor had uniformly made the half-yearly appointments; but with a view to insure the benefit of experience, they had always taken

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[1] s. c. 1 Yeates 427.
[2] s. c. 1 Yeates 409.
[3] s. c. 1 Yeates 476.
[4] Commonwealth *v.* Mitchell, 2 P. & W. 517; Miller *v.* Canal Commissioners, 21 Penn. St. 23; School Directors of Manheim, 5 Clark 400; Commonwealth *v.* Park, 2 W. N. C. 124.

care to keep three of the six old managers in office, until the last election, when six managers entirely new were appointed.

Bradford and *Ingersoll*, in support of the motion, contended, that the usage of re-appointing three of the old managers, was beneficial, and ought to be considered as the genuine construction of the law.

Rawle, in opposing the motion, admitted the usage, but insisted, that, on the terms of the act of assembly, the defendants were authorised to appoint six new members at every half-yearly election.

THE COURT, after advisement, rejected the motion.

RESPUBLICA *v.* RICHARDS.[1]

Kidnapping.

The 7th section of the act of 29th March 1788 (P. L. 443), did not extend to the case of a sojourner forcibly carrying off his slave; it only applied to free negroes.

THIS was an indictment, on the 7th section of the act supplemental to the act for the gradual abolition of slavery (2 Dall. Laws 589), which is ex-
*225] pressed in the following *words: "If any person or persons shall, from and after the passing of this act, by force or violence, take and carry, or cause to be taken and carried, or shall, by fraud, seduce, or cause to be seduced, any negro or mulatto, from any part or parts of this state, to any other place or places whatsoever, with a design and intention of selling and disposing, or of causing to be sold, or of keeping and detaining, or of causing so to be, as a slave, or servant for a term of years, every such person and persons, their aiders and abettors, shall, on conviction," forfeit 100*l.* and be confined at hard labor for any term not less than six months nor more than twelve months. The indictment contained two counts; the 1st charging the defendant with fraudulently seducing negro Toby from Pennsylvania into New Jersey, with a design to enslave him: and the 2d charging him with fraudulently causing negro Toby to be so seduced, for the same purpose.

Upon the evidence in support of the prosecution, it appeared, that negro Toby had been brought upon a temporary visit to Philadelphia, as a servant in the family of General Sevier, of the state of Virginia; that when General Sevier proposed returning to Virginia, the negro refused to accompany him; that after several propositions for securing him, the defendant told Mr. Sevier, that there was no way of managing the matter effectually, but by inducing the negro to go into New Jersey, and then to lay hold of him; that Toby was forcibly sent by General Sevier to Cooper's Ferry, whither the defendant went, on purpose to secure, and actually did secure him; that after some severity towards the negro, General Sevier arrived at the same place, and demanded Toby's pocket-book, which Toby, however, delivered to one of the witnesses, saying, "it contains my freedom papers"; that the witness delivered the pocket-book to General Sevier; and that, finally, the defendant and General Sevier put Toby on board of a boat and carried him down the river.

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[1] s. c. 1 Yeates 225.

The evidence on behalf of the defendant, proved, that Toby was a slave, belonging to the father of General Sevier, who had lent him to his son, merely for the journey to Philadelphia; and several witnesses, who had known Toby as a slave for more than ten years, were examined, to repel the idea, suggested by the negro himself, that he had ever been emancipated.

As soon as the testimony was closed, the COURT stopped the defendant's counsel, *McKean* and *Porter*, who were about to argue the case, and declared that it was unnecessary to make a single remark in his defense.

Hallowell and *Lewis*, in support of the prosecution, attempted to establish three position : 1st. That the defendant had seduced negro Toby from this, into another state, with an intention to enslave him : 2d. That the fact of Toby's being a slave did not satisfactorily appear: And 3d. That even if the fact of his *being a slave was proved, the offence of seducing a negro slave out of the state, in order still to keep him in slavery, was a [*226 punishable offence, under the act of assembly; which in the 7th section (differing from the other sections of the act), does not discriminate between the seduction of a negro, or a mulatto, whether he is a freeman or a slave; and if the law is positive and plain, neither the court nor jury can resist or modify it. 4 Bl. Com.; Vaugh. 159, 37; 1 Burr. 100; 2 Ld. Raym. 1423.

The Chief Justice, after stating the counts in the indictment, and the evidence, delivered a charge to the jury, in the following manner.

MCKEAN, Chief Justice.—The severity of the punishment to be inflicted in case of a conviction (a punishment the same, in its nature, as is inflicted for the most infamous crimes), ought certainly to induce the jury to deliberate well, before they determine that the act committed by the defendant, constitutes the offence which is the object of the law. The extravagant operation and extent of the doctrine, on which the prosecution is maintained, ought also to awaken the most serious attention: for, it has been contended, in effect, that should a traveller bring into this state a negro or mulatto slave ; nay, should a tradesman of Pennsylvania have a negro or mulatto indented servant, who, being sent on an errand, loiters away his time in tippling and debauchery, the master cannot forcibly seize and carry the delinquent to another place, either beyond, or within the jurisdiction of Pennsylvania, without incurring the penalties of the act of assembly ; if it is intended afterwards to keep and detain the negro or mulatto as a slave or servant. Is it rational to conceive, that any legislative body would have destined for such an act, so grievous a punishment ! Again, it has been alleged, that the law has made no difference, and therefore, that the court can make none, between a freeman and a slave, provided the injured party is a negro or mulatto. But is it possible, that any individual of common sense, that any assemblage of enlightened men, should so confound the nature of things, should so pervert the principles of justice, as to suppose, that it is as criminal for a master to carry off his own slave, with the intent to retain him in slavery, as for a stranger to carry off a freeman, with the intent to sell him into bondage ? Can these actions merit the same degree of punishment ?

It is evident, however, that such enormities are not imputable to the legislature of Pennsylvania. By the 10th section of the act for the gradual abolition of slavery (1 Dall. Laws 841), persons merely sojourning in this

state have a right to retain their slaves for a term of six months; and the delegates in congress from other states, foreign ministers, and consuls enjoy that right, as long as they continue in their public characters. *The *227] succeeding section likewise expressly provides, that absconding slaves shall derive no benefit from the law; but that their masters shall have the same right and aid to demand, claim and take them away, that they had before. This act of assembly, and particularly these provisions, are not repealed by the supplemental act, on which the prosecution is founded. Then, we find, that any traveller, who comes into Pennsylvania, upon a temporary excursion for business or amusement, may detain his slave for six months; and the previous law (recognised by the act of assembly, during that term, authorizes the master to apprehend the slave, and entitles him to the aid of the civil police to secure and carry him away, By a regulation of this kind, the policy of our own system is reconciled with a due respect to the systems of other states and countries; while an opposite construction would render it impossible for any American, or foreigner, to pass with a slave through the territory of Pennsylvania.

It has been said, that the words "slaves or servants," which are used in the other provisions of the supplemental act, being omitted in this section, it must be inferred, that the legislature intended to protect the slave or servant, as well as the freeman, from the outrage contemplated: but in our opinion, that very omission shows the fallacy of such a construction; for if the legislature designed to protect freemen, and not slaves, they could not, in any other way, more effectually manifest their meaning. In short, the evil apprehended was that of forcing a free negro or mulatto, into another country, and there, taking advantage of his color, to sell him as a slave; and for such an offence, the punishment denounced by the law would be justly inflicted.

Upon a review of the facts, likewise, we find occasion to regret, that the prosecution should have been conducted with a zeal, which rarely appears in the prosecution of the highest criminal, on the strongest proof. There is not, however, a tittle of evidence to establish the charge, that the defendant seduced the negro, or that he even spoke to him in Pennsylvania, where the act of seduction must be committed, to vest the jurisdiction in the court. Nor can it be fairly said, that he caused the negro to be seduced; for the advice given to General Sevier was merely the advice of a friend; which could not surely merit the ignominious punishment of the law; and which was not, in fact, adopted, as the negro was forcibly, and not by seduction, sent out of the state.

But upon the whole, we were unanimously of opinion, as soon as it was proved the negro was a slave, that not only his master had a right to seize and carry him away; but that, in case he absconded or resisted, it was the duty of every magistrate *to employ all the legitimate means of coer- *228] cion in his power, for securing and restoring the negro to the service of his owner, whithersoever he might be afterwards carried.

Verdict, not guilty.

Respublica v. Honeyman.

Indictment for murder.

In an indictment for murder, the act which was the efficient cause of the death, must be laid to have been *feloniously* done; it is not sufficient, to aver that the prisoner feloniously *assaulted* the deceased, and did the act, laid as the cause of death.

This was a writ of error to remove the proceedings in the case of a conviction for murder, at a court of oyer and terminer, and general jail delivery, held in Allegheny county. On the return of the record, the defendant assigned the general errors, and the attorney-general replied, *in nullo est erratum.* The indictment was set forth in the following words:

"Allegheny County, ss.

The grand inquest for the county of Allegheny aforesaid, upon their oaths and solemn affirmations, respectively, do present, that James Honeyman, late of the town of Pittsburgh, in the county of Allegheny, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-third day of November, in the year of our Lord, one thousand seven hundred and ninety-three, at the town of Pittsburgh, in the county aforesaid, in and upon one Benjamin Askins, in the peace of God, and of the commonwealth of Pennsylvania, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said James Honeyman, with both the hands and feet of him the said James Honeyman, in and upon the body of him the said Benjamin Askins, did strike, kick and bruise, and knock to the ground; giving to the said Benjamin Askins, then and there with the hands and feet of him, the said James Honeyman, by the striking, kicking and knocking to the ground of the said Benjamin Askins, several mortal bruises, of which mortal bruises the aforesaid Benjamin Askins, then and there, instantly died; and so the jurors aforesaid, upon their oaths and solemn affirmations aforesaid, respectively, do say, that the said James Honeyman, the said James Askins, then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the commonwealth of Pennsylvania, &c."

Dallas, for the defendant, made two exceptions: 1st. That the indictment does not state the grand inquest to be held "in and for the Commonwealth of Pennsylvania;" but only for the county of Allegheny, which may be out of the jurisdiction of the state. And 2d. That although the assault is stated to have *been done feloniously, &c., yet the technical and essential epithets are not applied to the striking, kicking, bruising and knocking, which must have been the efficient cause of the death of the person killed, and not the assault. [*229

The Attorney-General, *Ingersoll*, observed, that he did not consider the first exception material; but he declined any argument on the subject, as he was convinced the second exception must be fatal.

By the Court.—Let the judgment be reversed.(*a*)

(*a*) This indictment was tried shortly before the act passed (3 Sm. Laws, 187), by which the crime was divided into murder of the first degree, punishable by death; and

BURRALL v. DU BLOIS.

Arrest of judgment.

Judgment will not be arrested, because one of the counts of the declaration is defective; but the verdict will be directed to be entered on the good count.

THIS case was tried, and a general verdict given for the plaintiff, on the 11th of September. On the 15th of September, *Lewis* made a motion in arrest of judgment, because a general verdict was taken, and the action, clearly, would only be maintained on one of the counts in the declaration.

Dallas contended, that the motion was made too late, and cited 3 T. R. 623; Doug. 446; 1 T. R. 227; 4 Burr. 2526; 2 Woodeson 243; to show, in the computation of time, when the day on which an act was done, shall be deemed inclusive. He also moved to be allowed to enter the verdict on the first count in the declaration, agreeable to the authority in 4 Burr. 1235.

BY THE COURT.—The day on which the verdict was given should be reckoned inclusive; and therefore, the motion in arrest of judgment has been made too late.[1] But we have no doubt, that it is in our power to grant the plaintiff permission to enter the verdict on a proper count; and that it ought, in this case, to be granted.

The motion in arrest of judgment was accordingly dismissed, and the verdict entered on the first count. (*a*)

SEPTEMBER TERM, 1795.

*230] *PENN'S Lessee *v.* HARTMAN. (*b*)

Evidence.—Copy.

A certified copy of a paper, found in a public office, is not evidence, unless the original would be admissible, if produced.

EJECTMENT, brought by the late proprietaries, for a tract of land in the county of Northampton. On the trial, it was material for the lessors of the plaintiff to show, that a survey had been duly made and returned into the

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murder of the second degree, punishable by imprisonment at hard labor. From the facts reported by the judge who presided on the trial, Honeyman's offence would clearly have fallen under the latter division.

(*a*) The court waited until the last hour of the term, for the defendants' counsel, who was indisposed; but said, that in a case in which they were so perfectly satisfied, they could not keep it longer under advisement.

(*b*) Tried at Easton *nisi prius*, the 25th of June 1795, before McKEAN, Chief Justice, and SMITH, Justice.

[1] See Lane *v.* Shreiner, 1 Binn. 292. The practice is otherwise in the courts of Philadelphia county. Golder *v.* Blackstone, 1 T. & H Pr. 744 n.; Maguire *v.* Burton, 1 Miles 17.

land-office, before the 4th of July 1776, in order to establish their title to the premises, under the reservation contained in the 8th section of the act of assembly, vesting their estates in the commonwealth. 1 Dall. Laws, 822. They, accordingly, offered to give in evidence a paper, which was certified by J. Lukens, the surveyor-general, to be a true copy of the original in his office, purporting to be the return of a survey of 12,548 acres (including the land in question), situate in the forks of the river Delaware, and containing a draft, made in pursuance of a warrant, dated the 14th of November 1741: but the paper itself was not signed by any person, nor did it state by whom, or when, the draft was made, a blank being left for the day and year.

The *defendant's* counsel objected to the evidence. The paper is not authenticated by any signature; there is no proof that it is written in the handwriting of any public officer; nor how long it has been deposited in the land-office, and it has not gone with the possession of the land, which has been uniformly in the defendant. If, indeed, it cannot be considered as an *official* document, but as a *private* paper, however ancient it may be, the original must be produced; for a copy is not the best evidence the nature of the case admits. Every paper found in a public office is not evidence: it must be a paper which it was the duty of the officer to receive and record.

The counsel for the lessors of the *plaintiff* admitted, that the paper was in some respects defective; but contended, that there was no fixed rule as to the admission of evidence of this kind. In the case of *private* papers, it is true, that however ancient, they will not be admitted, if they are not regularly executed, *unless possession has gone along with them; but in the case of *office* papers, it has been the invariable practice, to give [*231 all papers found in a public office in evidence, without regard to the formalities of execution. The only question, therefore, is, whether the paper, now offered, was found under such circumstances of authenticity as to render it proper evidence? It is found in the custody of a public officer; and it can be proved, that it was in the surveyor-general's office, as early as the year 1763.

By the Court.—It is plain, that the paper offered is not the best evidence of which the nature of the case admits; for if the original was produced, it might be proved to be in the handwriting of a proper officer; or the contrary might be made to appear. We cannot, indeed, consider it as a regular office paper. The survey is not returned into the secretary's office, as the express words of the warrant enjoins; nor does it, in any way, appear, that it was made by an authorised person. The evidence must, therefore, be rejected.

Wilcocks, *E. Tilghman*, and *Sitgreaves*, for the plaintiff: *Bradford*, *Ingersoll*, *Lewis* and *Thomas*, for the defendant.(*a*)

(*a*) This case, and many other ejectments depending on the same title, were afterwards settled, by a compromise between the parties.

RAPELJE *v.* EMERY.[1]

Foreign judgment.

The judgment of a foreign court, in a foreign attachment, under which the money adjudged to be in the garnishee's hands has been paid over, is a complete protection to the creditor who has received it on the footing of the judgment.

Rapalje *v.* Emery, *ante*, p. 51, affirmed.

A VERDICT having been taken for the plaintiff in this cause, subject to the opinion of the court, the question (arising upon the same facts, set forth in the decision in the common pleas, *ante*, p. 51) was argued in April term last, on a motion for a new trial, and the judges now delivered their opinions *seriatim*, to the following effect.

McKEAN, Chief Justice.—Upon every view of the subject, I am of opinion, that a new trial ought to be granted. The proceedings of the court of St. Eustatius we must presume to be conformable to the law of the place; the decision appears to be strictly just; and independent of the merits, we are bound by it, as the decision of a competent tribunal.

SHIPPEN, Justice.—Having delivered my sentiments at large, in this action, from another bench, I mean now only to take notice of two new cases, cited at the last argument, by the plaintiff's counsel, to show that actions for money had and received, had been brought and supported against plaintiffs, who had recovered upon foreign attachments, to oblige them to refund to third persons the money so recovered. These are the cases of **Hunter* v. *Potts*, in 4 T. R. 182, and *Sill and others* v. *Warwick*, in Henry Blackstone's Rep. 665; in both of which, the ruling principles appear to be, that all the parties were subject to the bankrupt laws of England, where every man is supposed to be consenting to every act of parliament; that there was an actual vesting of the property of the bankrupt in assignees, for the benefit as well of the plaintiffs in the attachments as all the other creditors; that the plaintiffs, being jointly interested with the other creditors, and having a full knowledge of the whole transactions, took indirect measures to apply the whole property to their own use, in direct violation of the bankrupt laws, and their virtual contract with their fellow-creditors. It was, therefore, consistent with every principle of law and justice, to make those plaintiffs answerable to the assignees of the bankrupt, for the money they had so unfairly recovered by attachments in America, and which the assignees were entitled to, as trustees, as well for the plaintiffs in the attachments themselves, as the other creditors. Lord Loughborough, in delivering the opinion of the court in the latter case, is very careful to distinguish that case from the general case of the creditor, unconnected with the bankrupt laws, who recovers his debt in a competent court of justice, in a foreign country: for although he is of opinion, that the operation of the proceedings under the bankrupt laws of England is such as to vest the personal property of the bankrupt, in every part of the world, in the assignees, from the time of the assignment, yet he expressly declares, that a creditor in a foreign country, not subject to the bankrupt laws of England, nor affected by them, obtaining payment of his

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[1] s. c. *sub nomine* Meisner *v.* Amery, 1 Yeates 532.

debt, by the judgment of a foreign court, and coming afterwards to England, could not be made liable to refund that debt. He goes further, and says, that if the claim of the assignees of bankruptcy had been communicated to the court, who decided the case abroad, and they had preferred the claim of the suing creditor to theirs, although he should think that determination wrong, yet it could not be revoked by another court of justice in England.

This principle fully reaches the case before us. Emery, a creditor of Fairchild, attaches his effects in a foreign country, in the hands of Smith, the agent of Fairchild; Smith appears and makes defence, and, no doubt, communicated to the court the circumstances which lay the foundation of the present plaintiff's claim. The court adjudged, that the money in the hands of Smith was the property of Fairchild, and compel him, by their judgment, to pay Emery his debt out of it. Now, if we should even be of opinion, that the money in the hands of Smith was the property of Rapalje and not of Fairchild, yet, upon the principle of the case determined by Lord Loughborough, we have no power to *revoke that judgment. The whole matter was before that court, and they determined the property [*233 to be Fairchild's. The plaintiff in the attachment was wholly unconnected with the present plaintiffs, and cannot, upon any principle I know, be considered as receiving the money to their use. The more obvious recourse for the plaintiff is to Fairchild himself, or his estate, if he has left any; if not, it is more agreeable to law and justice, that the plaintiff should suffer by the default or failure of his own agent, than that a stranger, recovering a fair debt, in a regular court of justice, should refund the money to another stranger, with whom he had no manner of connection.

Yeates, Justice.—Whatever irregularity there may have been in rendering the foreign judgment, the judgment itself is conclusive, as the decision of a competent tribunal, upon a subject in litigation. We can have no legitimate power to revise or annul it.

If it were necessary to remark upon the merits of the original transaction, I should deem them, under all the circumstances, in favor of the defendant. The principles in Cowp. 200, might be fairly applied to the case.

Smith, Justice, concurred, and cited 1 H. Bl. 131.

A new trial granted.(*a*)

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*Warder *et al.* *v.* Carson's executors.[1]

Notice of non-payment.

Whether a sufficient notice of non-payment of a bill was given, to charge an indorser, is for the jury.

This was an action on a foreign bill of exchange, brought by the indorsee against the executors of the indorser, and a verdict was given for the plain-

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(*a*) See the same case, decided in the same way, in the Philadelphia court of common pleas, *ante*, p. 51. Judgment was afterwards rendered for the defendant; and affirmed upon a writ of error in the high court of errors and appeals.

[1] s. c. 1 Yeates 531.

tiff. A motion having been made and argued for a new trial, on the ground that there had been no proof of notice to the deceased indorser, that the bill was protested, and of a demand for payment on the drawer, the Chief Justice delivered the opinion of the court.

By the Court.—The only point before us is, whether due notice was given to the testator, of the demand and non-payment of the bill. From the peculiar situation of this country, notice must be considered as a matter of fact; and in that way it was left to the jury, in the present case, with this single remark, that the notice ought to be given as soon as it is practicable. No time, indeed, has been fixed, even in the city; but we should be disposed to think, that six or seven days would here be too great a delay.

The motion for a new trial rejected.

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*234] *Caignet v. Pettit et al.[1]

Consular jurisdiction.

A French subject, who had never assented to the Republic, but, leaving the French West Indies, had settled in the United States, held not to be a French citizen, for the purposes of consular jurisdiction.

This was a *scire facias* against the defendants, as garnishees of Gilbaud, Rouge & Co., French citizens, residing in the West Indies. A rule was obtained by the defendants, to show cause why the proceedings should not be quashed, upon the ground, that the plaintiff was also a French citizen, and that, therefore, the court was precluded from exercising any jurisdiction, by the 12th article of the consular convention, which provides, "that all differences and suits between the citizens of France, in the United States, or between the citizens of the United States, within the dominions of France, &c., shall be determined by the respective consuls and vice-consuls, either by a reference to arbitrators, or by a summary judgment, and without costs. No officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter: and the appeals from the said consular sentences shall be carried before the tribunals of France, or of the United States, to whom it may appertain to take cognisance thereof."

The facts respecting the plaintiff's citizenship were briefly these: He was a native of France, and resided in the Island of St. Domingo, at the period of the French revolution. He had afterwards accepted an office from Louis XVI., under the constitution establishing a limited monarchy; but previously to the abolition of monarchy, and the introduction of the Republican system (the 10th of Sept. 1792) he came to America, took an oath of allegiance to the State of Pennsylvania, under the act of March 1789 (2 Dall. Laws 676), which act, however, was at that time obsolete,(a) and purchased a tract of land, on which he resided. He had not been naturalized conformable to the act of congress; but he had frequently been heard to express his abhorrence of the existing constitution of France; he had never

(a) See Collet v. Collet, *post*, p. 294; and United States v. Villato, *post*, p. 370.

[1] s. c. 1 Yeates 456.

done any act showing his assent to it; and he had declared an intention to settle permanently in America.

The plaintiff's counsel (*Lewis* and *Levy*) made two points: 1st. That the 12th article of the consular convention applies only to cases where both parties, being French citizens, are actually resident within the United States, and therefore, does not embrace the case of a foreign attachment: 2d. That the plaintiff never was a citizen of the French republic; and in support of the latter position they cited the following authorities: Vatt. lib. 1, c. 13, § 161, 167; 2 Vent. 362–3; 3 Bl. Com. 298; Vatt. lib. 3, c. 18, § 293, 295; Ibid. lib. 1, c. 19, § 220, 213; 2 Heinec. 220; Art. of Confed. § 4; Johnson's Dict. "Citizen;" 1 Dall. 58.

*For the defendants, it was urged, by *Dallas* and *Du Ponceau*, on the first point, that the consular convention extended to all differences [*235 and suits between French citizens; that a foreign attachment was, unquestionably, a suit; and that the difference, or suit, existing in the United States, it was not material, either to the words or spirit of the article, that both the parties should be actually resident within the United States. On the 2d point, it was answered, that the plaintiff necessarily remained a French citizen, until he renounced his allegiance, or had done some act incompatible with it; that he was not a citizen of the United States; and unless he was a citizen of France, he exhibited the extraordinary spectacle of a human being who had no country!

By the Court.—Many important topics have been discussed, in the course of this argument; but we do not think it necessary to decide on more than one of them. The sole question is—were both the plaintiff and the original defendants citizens of the French republic, at the time of instituting this suit? We are clearly of opinion, from the facts disclosed in the affidavits which have been read, that the plaintiff was not then, nor is he now, a citizen of France. It is true, that he has not acquired the rights of citizenship here; nor, as it appears, in any other country: but, whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the revolution; and, as a member of the minority, to refuse allegiance to the new government, and withdraw from the territory of France. Everything that could be said or done to manifest such a determination, has been said and done by the plaintiff, except the act of becoming the subject or citizen of another country.

Let the rule be discharged.(*a*)

(*a*) On the subject of the consular jurisdiction, I have been favored with a note of the following decision, taken from the records of the circuit court for the district of Massachusetts, in May term 1792.

Villeneuve *v.* Barrion.

It was agreed by the parties, to submit this question to the court, to wit:—Whether the convention gave to the French consul cognisance of all differences and suits between Frenchmen; or confined the same to the description of cases therein enumerated, or other cases not arising from transactions in the United States? And further, that if the court should be of opinion, that the consular jurisdiction extends generally to all differences and suits between Frenchmen, that then the plaintiff shall discontinue the present action, without costs.

*Haddens v. Chambers.[1]

Bankruptcy.

A discharge under the bankrupt law of Maryland, does not bar a surety, who has been compelled to pay, after the principal's discharge.

The opinion of the Court was delivered in this case, by—

Smith, Justice.—At the court of *nisi prius*, held in Huntingdon county, the following case was stated for our opinion. The plaintiff was jointly and severally bound, as surety, in a bond with and for the defendant. After the bond became due, the defendant was discharged under the general insolvent act of the state of Maryland, passed in April 1787; and subsequent to that discharge, the plaintiff was sued on the bond, paid the amount, with interest and costs, and then instituted the present action (in which the declaration is for money paid for the use of the defendant) to obtain a reimbursement.

Under these circumstances, it is clear, that the action would be sustained in England, against a bankrupt, discharged by the bankrupt laws of that country. The insolvent law of Maryland does, indeed, exonerate the debtor from all debts due or owing from, or contracted by, him, prior to his deed of assignment; but the English statute contains words equally comprehensive; and yet, it has never been deemed to extend to cases like the present. The plaintiff could not have been entitled to a dividend of the insolvent debtor's effects, and it would be a denial of justice, to refuse him the only remedy, which he can have on this occasion.

Judgment for the plaintiff.

De Willer v. Smith.

Penal action.

This case came before the court on a *certiorari* to remove a judgment, which Smith had obtained before the Mayor of the City of Philadelphia, in a *qui tam* suit, brought against Catharine De Willer, as a huckster, upon an ordinance of the corporation (passed the 26th November 1792) which imposes a penalty of 37*s.* 6*d.* upon any huckster, who, within the limits of the city, shall buy any provision, fruit, &c., more than is necessary for his or her family use, except after ten o'clock on market days.

Two exceptions were taken to the proceedings by *J. McKean* and *S. Levy:* 1st. That the judgment did not state that De Willer was proved to be a huckster. 1 Salk. 404; 4 Bl. Com. 280, 281; 1 Burr. Inst. 330, 331, 333, 335, 336, 233. 2d. That the ordinance of the corporation is contrary to

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The Court, after hearing the counsel of both sides, on the question proposed, were of opinion, that the consular jurisdiction does not extend generally to all differences and suits between Frenchmen.

The plaintiff, thereupon, prayed leave to discontinue his said action, without costs; which being granted, he did discontinue accordingly.

[1] s. c. 1 Yeates 529.

the *constitution and laws of the state, and therefore, void. 1 Bac. Ab. 328; Const. of Penn.

The proceedings were supported by *Wilcocks* (the recorder) and *Thomas*, who contended, that the judgment was not in nature of a conviction, but founded on an action of debt; and that, therefore, it was unnecessary to state that defendant was proved to be a huckster. With respect to the power of the corporation to enact the ordinance, they urged, that it arose from the necessity of the case, since experience had evinced, that nothing less than the absolute prohibition contained in the ordinance, could defeat the stratagems of the hucksters, and prevent the extortion which they introduced.

Cur. adv. vult.

MILLER *v.* LEONARD *et al.*[1]

Depreciation.

A partial payment in continental money is a discharge *pro tanto;* a jury is not at liberty to scale it, under the depreciation act.

THIS was an action of debt on a bond for 250*l.*, dated the 7th of May 1776. On the 16th of September 1778, a payment had been made of 150*l.* in continental money; and the question now brought before the court was, whether this payment should be reduced and liquidated, according to the specie value of continental money, at the time of paying it?

For the *plaintiff*, it was contended, that the act of assembly (1 Dall. Laws 880) does not extend to any contracts, but such as were made between the 1st of January 1777, and the 1st of March 1781; and that, consequently, the payment in the present instance was not affected by the provision in the 4th section that "the auditors shall not have power or authority, in cases where partial payments have been made in money then current, to reduce such payment."

BUT THE COURT thought it unnecessary to hear the defendant's counsel, conceiving it to be clear and settled, that the payment in the present case, ought not to be reduced by the scale of depreciation.

Read and *Biddle*, for the plaintiff: *Clymer* and *Thomas*, for the defendant.(*a*)

KACHLIN *v.* MULHALLON *et al.* (*b*)

Defalcation.

Unliquidated damages in covenant, sounding in *tort*, cannot be defalked, under the plea of payment.

DEBT on a bond. Plea, *payment*, with leave, &c., and issue. The counsel for the defendants had given notice, agreeable *to the 39th rule of practice, that evidence to the following effect would be offered on the [*238

(*a*) Decided at Easton *nisi prius*, on the 1st of October 1795, before YEATES and SMITH, Justices.

(*b*) Decided at Easton *nisi prius*, on the 2d of October 1795, before YEATES and SMITH, Justices.

[1] s. c. 1 Yeates 571.

trial of the cause, to wit: That the bond was given for payment of the consideration money of a tract of land and mill, which the plaintiffs had sold to the defendants, reserving in the deed a right to swell and raise the water, so as not to injure the mill; but that the plaintiffs had raised the water, so as to injure the mill.

The counsel for the plaintiffs (*Ross* and *Thomas*) objected to the evidence, on the ground, that the injury, if it had really happened, was in the nature of a *tort*, for which the damages were not ascertained, and could not be set off, in an action upon the bond. 1 Bl. Rep. 394; Cowp. 5–6; 4 T. R. 74, 511; Doug. 665; 4 Bac. Abr. 116.

The defendants' counsel (*Ingersoll* and *Sitgreaves*) stated, that the evidence was not meant to operate, strictly, as a set-off, but as an equitable defence. The consideration of the bond had, in a great degree, failed, by the act of the plaintiffs; and as the consideration might be inquired into, anything is admissible in evidence, on the plea of *payment*, which tends to show, that the plaintiffs, *ex æquo et bono*, ought not to recover. 1 Dall. 17, 260. Besides, the reservation in the deed is in nature of a *covenant*, and wherever the intent of the parties appears under hand and seal, an action of covenant lies. 1 Ch. Cas. 294; 6 Vin. Abr. 381, pl. 21, 22; 2 Mod. 91; 1 Leon. 277, pl. 1; Ib. 375; 6 Vin. Abr. 319, pl. 12; 2 Com. Dig. 559, 560; 1 Saund. 322; 1 Salk. 196; Cro. Car. 437; 1 Sid. 423; T. Raym. 183.

By the Court.—The question is, whether, under the liberality of the practice of our courts of justice, such evidence is admissible? To decide in the affirmative, the case must either be embraced by the general provision of the act for defalcation (1 Dall. Laws 65), or by the 39th rule of the supreme court. Now, although our act of assembly extends further than the British statutes of set-off (2 *Geo. II.*, *c.* 22, and 8 *Geo. II.*, *c.* 24), we do not think it comprehends a defalcation of the nature contended for: and though the 39th rule of the court ascertains what evidence is admissible on the plea of *payment*, it contains nothing descriptive of the present circumstances, where there was a good consideration for the bond, though the defendants have been injured by the subsequent conduct of the plaintiffs.

If, however, the defendants would otherwise be without a remedy, we should be solicitous, by any rational construction of *the law, to admit the evidence: but it is clear, that they may have an adequate redress for the wrong which they have suffered, in a form of action suited to their case.(*a*) *239]

The evidence was rejected; and a verdict given for the amount of the plaintiff's demand.

(*a*) Yeates, Justice, added, that in the case of Sweetzer *v.* Garber, tried at *nisi prius*, in Cumberland county, when he was counsel for one of the parties, a similar principle was decided. The vendor had interrupted the vendee in the enjoyment of the tract of land, which had been sold; but the latter was not allowed to give the matter in evidence, in an action brought by the former, to recover the purchase-money.[1]

[1] See Stehley *v.* Irvin, 8 Penn. St. 500.

DECEMBER TERM, 1795.

RESPUBLICA *v.* ROSS.[1]

Competency of witnesses.—Forgery.

On the trial of an indictment for forging a promissory note, the supposed maker is competent to prove the forgery.
But the indorser of a forged note is not a competent witness, unless released.

THIS was an indictment, containing six counts, which charged the defendant, in various forms, with forging and uttering a promissory note, dated the 27th of July, 1795, purporting to be a note drawn by Joseph Heister in favor of John Smith, indorsed first by John Smith, and afterwards by Jacob Morgan; and with fraudulently conspiring with one Langford Herring, to procure Jacob Morgan to indorse the note, by means of a forged letter, purporting to be addressed by Joseph Heister, to Jacob Morgan. In the course of the trial, the following points of evidence were ruled by the court.

I. The attorney-general (*Ingersoll*, who was assisted by *Lewis* and *Heatly*) offered Joseph Heister, the supposed maker of the note, to prove that his signature was forged.

The counsel for the defendant (*Rawle*, *M. Levy*, *McKean* and *Dallas*) objected on two grounds: 1st. That no man is a competent witness to impeach the validity of a negotiable instrument to which he has put his name. 1 T. R. 296; 3 Woodes. 303. 2d. That the witness is disqualified, on account of his interest in the case; and though the verdict here could not be given in evidence in a civil action, the court and jury would be sure to hear of it. 2 Str. 728; Leach C. L. 9, 10, 50, 153; Bull. N. P. 288; 9 Leach C. L. 162, 287; 10 Mod. 192–3; 1 Str. 595; 2 Ibid. 1043, 1104, 1229; *Hardr. 330; 2 Hawk. P. C. 610, ch. 46, § 24; Leach C. L. 25. Nor does his [*240 interest rest merely on the eventual responsibility of his signature—it is directly involved in the conviction of the defendant; since, by two acts of assembly, he is entitled, upon that event, to a forfeiture; the first act inflicting a forfeiture of double the value, one-half to go to the party wronged; and the second act inflicting a penalty of treble the value, to the use of the party wronged. See 1 Dall. Laws, 5, 64.

The counsel for the prosecution answered these objections, to the following effect: 1st. In the present case, the indictment alleges, that the name of Joseph Heister is not subscribed to the note; this is the fact in controversy; and he, who is the only positive witness that can be produced, is offered to disprove the signature. But on the contrary, all the cases cited, proceed upon the ground, that the witness, confessedly, signed the instrument which he is called upon to discredit. 2d. Joseph Heister is not interested in the present case; but the record will not be in evidence in a civil action, brought against him as maker of the note. Nor is he interested under the acts of assembly that have been cited, as the forfeitures imposed by those acts are abolished by the existing code of penal laws. Bull. N. P. 288; 4 Burr. 2251;

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[1] s. c. 2 Yeates 1.

3 T. R. 36; 1 Vent. 49. The decisions in Pennsylvania have been uniform in the admission of such witnesses. 1 Dall. 110, 62; *Rex* v. *Chapman and Bates*, before the recorder (CHEW) in the mayor's court of Philadelphia, 1772; *Smith's Case*, in the quarter sessions of Northampton county; *Shepherd's Case*, before the recorder (WILCOCKS), in the mayor's court.

MCKEAN, Chief Justice.—Two objections have been taken to the competency of Joseph Heister, as a witness on the present indictment: 1st. Because his name appears to be subscribed to the note, which his evidence is intended to prove a forgery: and 2d. Because he is interested.

The first objection has been well and sufficiently answered, by the remark, that whether the name of the witness is really subscribed to the note, or not, is the fact in controversy, which the jury must decide. If the signature was allowed to be his, the objection would then, undoubtedly, be fatal.

On the second objection, I do not think, that the witness is so interested, as to render him incompetent. The verdict in the present case could not be received in evidence upon the trial of a civil action; nor would the court permit the counsel to refer to it. I confess, however, that, early in life, I entertained a different opinion on this point, conceiving then, that the weight of the adjudged cases was adverse to the competency of the witness, though I thought it hard that the law should be so. My *opinion has been *241] changed by the modern authorities, which give an evident preponderance to the opposite scale; and in general, the judges have, of late, been inclined to a more liberal admission of testimony, applying exceptions rather to the credit, than to the competency, of a witness. In the existing state of commercial transactions, indeed, when promissory notes, bills of exchange, bank checks, and other instruments, not authenticated by any subscribing witness, are daily circulated to an incalculable amount, every principle of policy must enforce the necessity of allowing the person, whose name is forged, to give evidence of the fact.

But independent of these considerations, we find the law has been established by the repeated decisions of the courts of Pennsylvania, as well before, as since, the resolution; and, particularly, in a late case of *Respublica* v. *Wright* (which may be added to those cases that were cited at the bar), determined by my brother YEATES and myself at *nisi prius*, in the county of Bucks. I am, therefore, of opinion, that the witness ought to be sworn.

SHIPPEN, Justice.—I concur in the opinion given by the chief justice, but only for one of the reasons which he has assigned. It appears clearly to my mind, from all the English authorities produced, that in that country, there has been no relaxation of the rule upon the question of interest, respecting the testimony of the parties injured, in cases of perjury and forgery; but on the contrary, from the case in Hardress 331, down to the case in Leach 287, it has been the general practice, to give a release to the witness, in order to render him competent. In point of policy, likewise, there is, undoubtedly, an inconvenience arising from the adoption of either doctrine; for the witness may be biassed by the reflection, that although the record on the indictment cannot be given in evidence in a civil action, yet, that the conviction will be talked of, and insensibly prejudice the public in his favor.

My acquiesence, therefore, in the opinion which has been just delivered, is founded entirely on the authority of the cases that have been adjudged in this state. These seem to have settled the law, in favor of admitting the testimony proposed; and I am sensible of the importance of preserving uniformity in our municipal decisions.

YEATES and SMITH, Justices, declared their concurrence in the opinion of the court, as delivered by the chief justice.

II. The attorney-general offered Jacob Morgan the indorser of the note, as a witness, admitting that the indorsement was in the handwriting of Morgan, and that he was liable for the amount of the note to Thomas Allibone, the holder.

*The counsel for the defendant opposed the admission of the testimony, contending, that Morgan was disqualified from proving the [*242 note a forgery, having given credit to it, by his indorsement. 1 T. R. 296; 3 Ibid. 34.

The counsel for the prosecution answered, that Morgan could have no interest, as he confessed himself to be liable to the holder of the note, whatever might be the issue of the trial. But—

BY THE COURT.—The objection is not on the ground of interest; but on the impolicy of suffering a man to discredit an instrument, to which he has previously given credit, by his indorsement.[1] The rule of law seems settled; and is, in general, a good one. However desirous, therefore, we may be to obtain the light of this witness's evidence, we must, for that reason alone, reject it.

III. The counsel for the prosecution then proved, that Jacob Morgan had paid the note and taken it up (which was done in court), and offered him again as a witness. The prisoner's counsel still objected; but THE COURT overruled the objection; and the witness was sworn.

Verdict, guilty on the count for fraudulently procuring Morgan to indorse the note, and not guilty on the other counts of the indictments.

MARCH TERM, 1796.

RALSTON, assignee, *v.* BELL.

Cause of action.

THIS was an action for money had and received, &c., brought by Ralston, as assignee of Dewhurst, a bankrupt, against the defendant, who had sold goods of the bankrupt, by virtue of an authority from him; but it appeared in evidence, that no money had been received by the defendant, at the time of commencing the action.

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[1] The rule in Walton *v.* Shelley has no application, except in a suit upon the note itself. Wright *v.* Truefitt, 9 Penn. St. 507; Campbell *v.* Knapp, 15 Ibid. 27.

The counsel for the defendant (*Ingersoll*, *Lewis* and *Dallas*) objected, that, on this evidence, the present action could not be maintained.

The counsel for the plaintiff (*Rawle* and *Wilcocks*), after some remarks, and citing Doug. 132, submitted to the decided inclination of the COURT, and suffered a . Nonsuit.

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*243] *RUSTON'S executors *v.* RUSTON.[1]

Legacy charged on land.—Payment of mortgage out of personal estate.

When land is devised to a son, provided he pay to the executors a sum of money, at fixed periods, this is a charge on the land; and if the devisee enter, he becomes personally liable for the same.

When land is specifically devised, incumbered by a mortgage given by the testator, his personal estate shall not go in ease of the mortgaged premises, so as to defeat specific or pecuniary legacies; otherwise, as to the residuary legatees.

IN this action, a verdict had been taken for the plaintiffs, for 2096*l.* 13*s.* 4*d.* subject to the opinion of the court, on a point reserved, to be argued upon a motion for a new trial. The case was this:

Job Ruston made his last will and testament, dated the 17th of January 1784, and thereby, first, "after his just and lawful debts and funeral charges paid, he bequeathed 500*l.*, and some specific goods and chattels, to his wife. He next devised all his real estate to his eldest son Thomas, in fee, provided he paid to his executors 3000*l.*, by annual instalments, during seven years and a half; and directed, in case of his son's failing to make these payments, within three months after the times limited for them, respectively, that his executors shall sell and convey particular parts of his real estate; but he made no provision for the sale of the residue, consisting of a messuage, mill, and tract of 325 acres of land. He then gave to each of his children legacies in money, and also some specific legacies, which were to be in full of their respective shares of his estate: he bequeathed 100*l.* to a charitable use, to be taken out of the remainder of his estate, before any share or dividend shall be made to his sons and daughters: and lastly, he willed and bequeathed the remainder of his estate to his five children, to be divided into ten parts, of which one part is given to his said eldest son, Thomas Ruston, another to his daughter Sarah, and the remaining eight parts are given to the three younger children, in equal proportions."

Part of the testator's real estate, devised to his son Thomas Ruston, was subject to a mortgage given to the managers of the Pennsylvania Hospital. Thomas Ruston, the devisee, had paid no part of the 3000*l.*; the lands which the executors were empowered to sell had, consequently, been sold; but after applying the proceeds of the sale, some of the debts, and all the pecuniary legacies, remained unpaid. For the difference between the proceeds of the sale, and the 3000*l.*, the present action was brought.

The case was argued, in September term last, by *Ingersoll* and *McKean*, for the plaintiffs, and by *E. Tilghman* and *Heatly*, for the defendant: And two questions were made. 1st. Whether the whole of the real estate devised to the defendant, Thomas Ruston, was liable for the payment of the

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[1] s. c. 2 Yeates 54.

3000*l.*, for satisfying the testator's debts and legacies? 2d. Whether the defendant was bound to discharge the mortgage on a part of the lands devised to him, out of his own funds; or the executors were bound to discharge it out of the testator's personal estate?

On the first question the plaintiff's counsel cited 2 Vent. 357; *1 Eq. Abr. 199, pl. 10; 2 Vern. 26; Bendl. Rep. 281; Dyer 358; [*244 1 Atk. 382; 3 Bro. Ca. in Ch. 165: And on the second question they cited, 1 Ch. Ca. 271; 1 P. Wms. 730–1; 1 Eq. Abr. 142, pl. 7; Ibid. 143, pl. 11; 3 Woodes. 485.

The counsel for the defendant cited, 2 Bl. Com. 119, 111; 1 Atk. 382; Shep. T. 121; Lov. on Wills 54; 1 Cha. Ca. 271.

On the 2d of April 1786, the chief justice delivered the following opinion:

McKean, Chief Justice.—In the case of an intestacy, the rule of law is clear, that simple-contract debts, bonds, mortgages, and specialties of every sort, must be paid by the administrators, out of the personal estate, this being the natural fund for debts, though the younger children should be thereby left destitute: but where there is a will, the testator can substitute other funds in the place of the personal estate. What has Job Ruston willed in this particular, is the question.

The intention of the testator shall govern the construction of a will in all cases, except where the rule of law overrules the intention, and this is reduceable to four instances. 1. Where the devise would make a perpetuity. 2. Where it would put the freehold in abeyance. 3. Where chattels are limited as inheritances. 4. Where a fee is limited on a fee. *Papillon* v. *Voice*, Sel. Cas. in Ch. 31. And this intention must be collected from the whole of the will or writing itself. 3 Burr. 1541, 1581, 1662; 2 Ibid. 771, 1106; 1 Ves. 231; and many other books.

What then was the intention of the testator, as expressed in his will? The value of the real estate devised to the defendant, the *quantum* of his debts, and the amount of his personal estate at his death, would give considerable light in this matter. These have not been satisfactorily ascertained to us. However, we have been told, that the debts, specific and pecuniary legacies, with the charges of administration, will amount to about 3860*l.*, and that the personal estate produced only 588*l.* 13*s.* 9*d.* So that if the defendant had paid the 3000*l.* there would have been a deficiency of 270*l.*, and upwards, and nothing left for the residuary legatees. The counsel and the defendant insist, that he shall hold the remainder of the real estate, unsold by the executors, exempt from the payment not only of any of the legacies, but also of the debts, unless the personal estate and the produce of the land sold shall prove insufficient for the discharge of the debts; because they say, the 3000*l.* was no legacy to the executors; it was no charge on the lands, for they were all devised to the heir-at-law; it was no condition, there being no remedy in case of failure; and it was no limitation, there being no devise over.

*The defendant took possession of the lands so devised to him; this evidences his assent to pay the 3000*l.*, and the intention of the [*245 testator that he should pay it to his executors, is too plain to bear argument. What rule of law or reason is there, to prevent the executors from

recovering it? Suppose, the devise to the defendant had been subject to the payment of his debts, instead of a certain sum of money, viz., 3000*l.*, as in this case, the lands would be assets at law. The testator has subjected the gift to the payment of the 3000*l.*, and it must pass *cum onere*, I, therefore, consider the 3000*l.*, on the first question, as an *equitable*, if not a legal charge, or as a trust or condition, which affects and binds the real estate devised to the eldest son Thomas Ruston, and which it was the manifest intention of the testator he should pay at all events. Thomas could not be considered, in this case, as heir-at-law, in Pennsylvania; where, if, at that time, a person died intestate, leaving divers children, his real estate descended to all his children equally, the eldest son having only a double portion or share; and therefore, the devise may be considered even a condition. Cas. in Eq. temp. Talbot 271; 1 Atk. 383; 3 Wils. 325.

The same judgment was given by all the then justices of the supreme court, five years ago, between the same parties, on a case stated on this very point; which I deem conclusive.

But the second question, respecting the payment of the mortgage on the 218 acres, is new.

It appears to have been the intention of the testator, that the legacies, *specific* and *pecuniary*, should be paid, as well as that the devise of the real estate should take effect; and if practicable, the assets should be so marshalled, that the testator's intention in the whole should be carried into execution. The testator seems to have thought the 3000*l.* would have been sufficient to have discharged all his debts, and also the particular *pecuniary legacies;* but in this, he has been mistaken.

A mortgage is a debt; it arises on a loan; and there is a covenant to pay the money: it is a specialty debt. Thomas Ruston is an *hæres factus* of the whole real estate, on his payment of the 3000*l.*; and if that sum had been more than sufficient to pay off all the particular pecuniary legacies, by which, I mean those given to his widow and children in full of their respective shares of his real estate, I would be of opinion, that the mortgage should be paid out of the residue of that sum, as much as any other debt, and that he should not take the estate with this additional incumbrance, as it does nowhere appear in the will, that the testator meant he should take it with this lien upon it.

It is the constant practice in chancery, to allow children the same favor as creditors. Talbot 275. I, therefore, think, that the *specific* and *particular* pecuniary legacies bequeathed to the children *ought not to be brought in case of the particular lands mortgaged; but it seems to me, that the devise of the residuary part of the personal estate should give way to the devise of the real estate, subjected to the mortgage, and be applied, so far as it will go, in discharge of the mortgage; for the devisee of the real estate must take it *cum onere*, that is, subject to the mortgage, unless the residue of the personal estate will be sufficient to discharge it. See Gilb. Rep. in Eq. 72; Talbot 202; 2 Atk. 230; 1 Wils. 730, 694; Prec. in Cha. 578.

*246]

The following judgment was thereupon entered.

By the Court.—It is considered by the court, that the plaintiffs recover the sum of money mentioned in the verdict, together with lawful interest

thereon, and the costs of suit; and that if there should remain any overplus, after paying and satisfying the general debts, the specific and pecuniary legacies, out of the personal estate, and the equitable charge of 3000*l.* on the lands devised to the defendant, that the same be applied, in the first place, in discharge of the mortgage on part of the said lands to the managers of the Pennsylvania Hospital, and afterwards, of the charitable legacy, and then among the residuary legatees, agreeable to the will of the testator.

Nicholson's Lessee *v.* Mifflin.[1]

Agency.

The authority of an agent to sell lands, must be in writing;[2] he is incompetent to prove his own agency.

A question arose in this case, whether the defendant had given a written authority to Edward Bonsall (a scrivener, who kept an office for the sale of lands) to dispose of the premises in question, which the lessor of the plaintiff alleged he had contracted for, and bought, under that authority.

To prove that a written authority was given, but had been mislaid, the plaintiff's counsel offered Edward Bonsall, as a witness: But—

By the Court.—The agent is not a competent witness to prove his own authority for the sale of lands, in this way: the contents of the writing must be proved by other witnesses; and then he might be allowed to show in what manner he had executed his instructions.

The plaintiff not being able to give any other evidence of this preliminary fact, suffered a nonsuit.

Lewis and *Gibson*, for the plaintiff. *Ingersoll* and *Condy*, for the defendant.

SEPTEMBER TERM, 1796.

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*Waters *v.* Collot.[3] [*247

Bail.

The court will not discharge on a common bail, when there is a sufficient case to go to the jury.

Capias. *Ingersoll* and *Lewis* had obtained a rule upon the plaintiff to show his cause of action, and why the defendant should not be discharged on common bail. *Dallas* and *Du Ponceau* now showed cause.

It appeared, that the plaintiff was master of the Kitty, a brig, which, together with her whole cargo, belonged to Stephen Girard, an American citizen of Philadelphia, bound on a voyage from this port to Jeremie in the Island of St. Domingo, and back again. The brig had arrived at Jeremie, and sold part of her cargo to the French government there, before the port

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[1] s. c. 2 Yeates 38; and see Lewis *v.* Bradford, 10 Watts 67; Twitchell *v.* Philadelphia, 33 Penn. St. 212; Parish *v.* Koons, 1 Pars. 79.

[2] But it need not be under seal. Baum *v.* Dubois, 43 Penn. St. 260.

[3] s. c. 2 Yeates 26.

and town were taken by the British; after which, having purchased some produce, the plaintiff was permitted by the British captors to proceed to Cayemite, to obtain the money due to him from the French government, and to complete his return-cargo. On the 3d of November 1793, he sailed from Cayemite, for Philadelphia; but meeting with considerable damage on the American coast, he was compelled to bear away for the island of Guadaloupe. When he had arrived within three leagues of Basseterre (for which he was actually steering), he was boarded by a French privateer, carried into the road of Basseterre, and personally maltreated by the privateer's men. The vessel and her cargo being libelled before the tribunal for the district of Basseterre, the judge, after a full examination of the ship's papers, pronounced a decree "that the brig Kitty, her cargo, and all her appendages, should be restored, and that the captors should pay the costs." But the defendant, who was the governor and commander in chief of Guadaloupe, directed an appeal from this decree to be brought before him; and although the court, and the national commissary protested, in the strongest terms, against his power to take cognisance of the case, he proceeded to confiscate the brig and her cargo, for the benefit of the privateer. The court attempted in vain to execute its decree, but the governor succeeded in enforcing his mandate. The defendant being obliged, soon afterwards, to seek an asylum in Philadelphia, the plaintiff (who had a considerable adventure on board the brig) arrested him in the present action, to recover the amount of his damages.

*248] *On arguing the motion, it was contended by the *defendant's* counsel, that the defendant had acted in his official capacity, and was only responsible to his own government for his misconduct. That the remedy of any injured American citizen was, by applying likewise to his own government, which is bound to protect his rights, and to procure a redress. That the commission of the defendant gave him a general superintendence over the affairs of the Island; and that many things were justifiable to be done by an executive officer, in a revolutionary period, for which it was not just, or reasonable, to make him answerable by any other than the law of the country in which he acted.

The counsel for the *plaintiff* observed, that on a preliminary motion of this kind, it was only necessary to show a probable cause of action; and they contended, that having proved the plaintiff's interest in the cargo of the brig, and the tortious seizure by the defendant, in direct violation of the decree, pronounced by a competent tribunal, it was matter of defence, proper for a trial before a jury, to show that the defendant's conduct was justified by his official authority or duty.

But it was urged, that there was no color for such a defence. The commission of the defendant extends only to a military control; it gives no appellate jurisdiction from the tribunals of justice; and even state necessity could not be pretended, as the brig and cargo were not seized and appropriated to the public use; but were confiscated for the benefit of the owners of the privateer. The responsibility of a foreign magistrate to his own government exclusively, for his official acts, will not be disputed; but if a man, who happens to be the officer of a foreign government, does an injury to the property or person of an American, without a public authority, motive or

object, he is responsible, like any other individual, at the suit of the injured party. Whether the present aggression was a private, or an official, act, is the gist of the controversy; and on that point, the plaintiff is entitled to a trial; which, however, he is not likely ever to obtain with effect, if the defendant, a traveller, is discharged on common bail.

By the Court.—We think, that there is sufficient cause shown, for holding the defendant to bail. But it must not be understood, that, by this decision, we give any countenance to an opinion, that he is ultimately liable. It is a question of great delicacy, in which our regard for the rights of a fellow-citizen, and our respect for the sovereignty of a foreign nation, are equally involved. When, therefore, the subject is judicially investigated, we shall be governed, as well by the law of nations, as by our municipal law.(*a*)

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*Barriere v. Nairac. [*249

Practice.—Arrest of judgment.

For a defect in the plaintiff's title, apparent on the face of the declaration, judgment will be arrested, after a default, and writ of inquiry executed and returned.

This was an action upon a promissory note, brought by the plaintiff, claiming to be indorsee of one Vuyton, against the defendant, the maker of the note; in which the following declaration was filed.

"Philadelphia County, ss.

"Peter Nairac, late of the county aforesaid, yeoman, was attached to answer Peter Barriere, indorsee of Vuyton, on a plea of trespass on the case, &c. And, whereupon, the said Peter Barriere, by Peter Stephen Du Ponceau, his attorney, complains, that whereas, the said Peter Nairac, on the 8th day of June, in the year of our Lord one thousand seven hundred and ninety-two, at Cape François, to wit, at the county aforesaid, made his certain note in writing, commonly called a promissory note, with his own proper hand subscribed, bearing date the same day and year last aforesaid, in and by which said note, he, the said Peter Nairac, promised to pay to a certain Vuyton, the sum of five thousand five hundred and ninety-three livres, fifteen sols and eight deniers, money of the French colony of St. Domingo, equal to six hundred and seven dollars and four cents, lawful money of the United States, whenever he, the said Peter Nairac, should be thereunto required, for value received by the said Peter Nairac, of the said Vuyton, in acquittance and for balance of account with the succession of Fissont; and being so indebted, he the said Peter Nairac, afterwards, to wit, the day and year last aforesaid, at Cape François, to wit, at the county aforesaid, in consideration thereof, upon himself assumed, and then and there to the said Vuyton faithfully promised, that he would well and truly pay to him the said sum of five thousand five hundred and ninety-three livres, fifteen sols, eight deniers, of the value of six hundred and seven dollars and four cents, whenever afterwards he should be by him thereunto required.

(*a*) The defendant complained of his arrest to the government of France, by which it was made a matter of public complaint against the federal government; and eventually, the plaintiff discontinued his action.

And the said Peter Barriere in fact saith, that the said Vuyton afterwards, to wit, the day and year last aforesaid, at Cape François, to wit, at the county aforesaid, did require the said Peter Nairac to pay to him the said sum of five thousand five hundred and ninety-three livres, fifteen sols, eight deniers, being the contents of the said promissory note; and afterwards, to wit, on the 3d day of May, in the year of our Lord one thousand seven hundred and ninety-four, at Baltimore, to wit, at the county aforesaid, the said Vuyton being unpaid and unsatisfied of the contents of the said note, by indorsement under his hand, on the said note, appointed the contents thereof to be paid to the said Peter Barriere, or to his order, for value received, whereof the said Peter Nairac then and there had notice, and the said Peter *250] Nairac afterwards, to wit, the day and year last aforesaid, in *consideration of the said indorsement, upon himself assumed, and then and there, to the said Peter Barriere faithfully promised, that he would well and truly pay to him the contents of the said note, whenever afterwards he should be by him thereunto required."

Judgment had been obtained for want of a plea; a writ of inquiry of damages had been thereupon issued and returned; and now *M. Levy* made a motion in arrest of judgment, on this ground(*a*)—that the declaration sets forth a promissory note payable to Vuyton alone, and not to order; and therefore, there is no authority for the plaintiff to bring the action in his own name, as indorsee. H. Bl. 605; 2 Ld. Raym. 1397; Bailey on Bills of Exchange 1; 1 Dall. Laws 107.

Du Ponceau admitted the general principle of the objection; but contended, that it was too late to make it, after the return of a writ of inquiry, which must be regarded in the light of a general verdict. If it does not appear to be a note to order, neither does the contrary appear; and after a general verdict, the presumption will be in favor of the plaintiff's right to sue. In 1 Dall. 194, the case was founded on a *special* verdict, the defendant not daring to trust it to a general verdict; and in Doug. 683, the judgment was arrested, because there was no allegation of notice of the protest, which could not be presumed from any fact stated in the declaration. Where, indeed, a title appears defective on the face of the record, a verdict will be set aside; but not where the title is merely defectively set forth. 4 Burr. 2020. If a fact must have been proved on the trial, it will be presumed, after a general verdict, even though it be matter of substance. Cowp. 825. Here, a sufficient title is proved, because the plaintiff sues as indorsee, *eo nomine*, and after stating the note and indorsement, the defendant became liable; and as the statute, which makes a defendant liable, in an action by the indorsee, expressly and exclusively refers to notes made payable to order or assigns, the plaintiff must, of course, have proved everything on the trial that the statute requires to entitle him to an action—to wit, that the note was an indorsible note. The objection, therefore, is founded on a mere omission, which is aided by a general verdict.

M. Levy, in reply.—The plaintiff must bring himself within the act of Pennsylvania, by something appearing on the record: it is neither by the

(*a*) There was another ground mentioned, to wit, that the original parties to the note were both French citizens, and the plaintiff merely a collusive indorsee, so that the French consul, and not the state courts, had jurisdiction of the cause: but this point was not at all argued.

operation of the statute of *Ann.*, nor by the customs of merchants, that he is entitled to institute an *action here in his own name. The act, then, only enables an indorsee to sue, where the note was originally made [*251 payable to order or assigns: that it should be so payable, is the very essence of the plaintiff's title; and he cannot recover, unless it is alleged in the pleadings, as well as proved on the trial. There is a material difference between verdicts and inquests, not only in the solemnity and publicity of the proceedings, but in the requisites to form a decision. The interlocutory judgment compels an inquest to find some damages; and therefore, it is not necessary to prove a note, before the inquest, as it is before a jury; nor is it indispensable to produce in the former, as it would be, in the latter case, an indorsible note. The affirmance of the judgment, on the return to a writ of inquiry, is, in legal contemplation, the act of the court; but it is done *ex parte*, at the instance of the plaintiff; and it cannot amount to more than an affirmance of the cause of action, as it is stated on the record. But even regarding the verdict, on a writ of inquiry, in the light of a general verdict, it is not necessarily to be presumed, that the note was made payable to order or assigns; nor that the fact was so proved. The *probata* may be supposed to be co-extensive with the *allegata*, but not more; and there is an obvious distinction between a fact which constitutes the plaintiff's only legal title to the action, and a fact (as in the cases cited from Burr. 2020; Cowp. 825) which merely localizes the suit. If the essence of the plaintiff's title is omitted, nothing can be presumed in support of a verdict: no proof at the trial can make good a declaration, which contains no ground of action on the face of it. Doug. 683; Tidd's Pr. 614.

McKean, Chief Justice.—It occurred at once to the court, that if the objection was not made too late, it must prevail. There is nothing, however, on the record to show, that the parties were both fully heard, upon executing the writ of inquiry; and after an interlocutory judgment, the inquest were bound to give some damages. There is, likewise, in the nature of the subject, in reason, and in law, a material difference between a verdict, which is obtained upon a public trial in open court, where counsel are employed to investigate the merits, and judges to superintend the decision, of the cause —and a verdict, which is obtained on a writ of inquiry, issued *ex parte*, and executed without such important aids to enlighten and direct the judgment of the inquest. In the present instance, it may be remarked, that great injustice might be done to the defendant; for if the note should, by any means, get again into Vuyton's hands, and he should sue upon it, could a judgment in favor of the present plaintiff be pleaded in bar to that action?

*It is a general rule, that any exception which may be taken advantage of on a writ of error, may also be taken advantage of, on a [*252 motion in arrest of judgment. By the declaration, it appears, that the party had not a cause of action; since the promissory note is there stated to have been made payable to Vuyton only, and not to his order. For this defect of title (which will be apparent from the record whenever, and wherever, it may be examined), there is no doubt, the judgment would be reversed on a removal into the high court of errors and appeals: and if it would be sufficient ground to reverse, I repeat, that it is a sufficient ground to arrest, the judgment.

Judgment arrested.

HARTSHORNE'S Lessee *v.* PATTON.

Jury.

The court cannot direct a sheriff to summon a jury from any particular part of a county.

THIS cause had been tried repeatedly in the city of Philadelphia; but the jury could not, in any instance, agree upon a verdict. *Ingersoll*, therefore, suggested to the court, that in order to obtain a jury, whose minds were unbiassed by reports, discusssions and conversations, relating to the contraversy, they should be directed to return a panel from the county, exclusive of the city.

McKean, on the other hand, observed, that the court could not give any such directions, without consent of the parties, and that consent would not be given.

BY THE COURT.—Can we direct the sheriff to take a jury from any particular part of a county? Surely not. There are no persons, in fact, interested, but the parties; and if a legal exception can be established against the whole panel, or any individual juror, it will be allowed at the proper time.

PERIT, executrix, *v.* WALLIS.

Interest on bond.

Interest may be recovered, by way of damages, beyond the penalty of a bond, to the extent of interest upon the penalty.[1]

THIS was an action of debt on a bond, which was executed upon the 29th of January 1789, by the defendant, to Peletiah Webster, the testator, in the penal sum of 5000*l.*, with the following condition subjoined:

"Whereas, the said Samuel Wallis did, by his deed, duly executed under his hand and seal, bearing even date with these presents, grant, bargain and sell unto the said Peletiah Webster, a certain tract of land therein described, containing 12,625 acres, and contracted to make a clear title in fee, under a patent or patents from the state of Pennsylvania, for the same: *253] And whereas, patents from the said lands have *not yet been obtained: Now know ye, that the condition of the above obligation is such, that if the above-bounden Samuel Wallis doth, within six months from the date hereof, well and truly obtain from the land-office of the state of Pennsylvania aforesaid, good and sufficient patents for all the lands described and conveyed within the deed aforesaid, as reference being thereunto had will appear, and convey or cause them to be conveyed to the said Peletiah Webster, by good and sufficient deeds and assurances in the law, then the above-written obligation to be void, otherwise, to be and remain of full force and virtue."

After *oyer*, the defendant pleaded performance of the condition; and the plaintiff replied non-performance, assigning as a breach of the condition,

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[1] Boyd *v.* Boyd, 1 Watts 365; Hughes *v.* Hughes, 54 Penn St. 240; Weikel *v.* Long, 55 Id. 238; New Holland Turnpike Co. *v.* Lancaster County, 71 Id. 442.

that the defendant did not, within six months after the execution of the bond, obtain patents for the lands, and convey them, or cause them to be conveyed, to the plaintiff. On these pleadings, issue was joined, the cause was tried, and a verdict was given in favor of the plaintiff, "for 5000*l.* debt, and 1922*l.* 10*s.* damages and costs; subject to the opinion of the court on the damages, which are given for interest."

The question before the court was: whether the plaintiff was entitled to recover interest upon the 5000*l.* penalty, from the expiration of the six months allowed for the performance of the contract? And it was argued by *Ingersoll* and *Lewis*, for the plaintiff; and by *Coxe* and *M. Levy*, for the defendant.

For the *plaintiff*, it was insisted, that in every point of view, the interest ought to be allowed, and that it was the province of the jury to allow it, by way of damages. And the counsel illustrated, exemplified and enforced the principle of their argument, by cases of penalties given under particular statutes; by cases where the penalty is given in a bond for the payment of an additional sum, if the sum mentioned in the condition should not be punctually paid; by cases where the penalty is given as a security for the performance of a collateral act; and by cases where the penalty is considered as the fixed and ascertained damages, mutually agreed upon by the parties themselves; in all which, it was urged, that damages had been carried beyond the penalty; and the following authorities were cited: 2 T. R. 388–9; Bunb. 23; Show. Parl. Ca. 15, 16; Bull. N. P. 178; 1 Salk. 206; 1 Vent. 133; 3 Cro. Car. 559; 1 Fonbl. Eq. 141; 1 Bro. Ch. 418; 2 Fonbl. 430; 1 Vent. 133; 2 Hawk. P. C. 273; Carth. 230; 3 Lev. 374. If, then, the jury had a power to give damages at all, the interest was the most reasonable rule that could be adopted to estimate them. 2 Fonbl. Eq. 423; 1 Dom. C. L. 401. And the expiration of the six months was the proper time to compute the damages from, without regard to any demand; for where a certain *sum is payable on a certain day, a demand is not necessary to be made or proved. Imp. Mod. Pr. 194, 202. The plaintiff might [*254 have proceeded on the covenant in the original deed, and would, doubtless, be then entitled to recover damages commensurate with the injury; and the penalty is only a collateral guard to the agreement, providing a further remedy at law. 1 Fonbl. Eq. 141.

For the *defendant*, it was premised, that a great contrariety of opinion appeared in the cases on this subject; and that a rule had certainly been adopted in the court of chancery different from that which prevailed in the courts of common law; the former allowing interest, sometimes even exceeding the penalty, but the latter always refusing it. 3 Bro. Ch. 489, 496. When, however, the allowance was made, it was confined to cases of bonds for the payment of money, where interest, by a computation on the sum mentioned in the condition, may exceed the penalty; but the present question must be classed with the cases of fixed and ascertained damages; and there is no instance, in such a case, of more than nominal damages being given beyond the penalty, and that merely for the purpose of entitling the party to his costs. H. Bl. 11; 1 Cases in Ch. 226; 16 Vin. 303, pl. 10; 1 Vern. 350. The penalty is the fixed and stipulated extent of the damages for not performing the contract, including all delay, vexation and interest:

It may be regarded as such, without any express declaration in the instrument; and whatever is the contract of the parties must prevail; for *modus et conventio vincunt legem.* (H. Bl. 231, 232.) In 2 W. Bl. 1190, there is the case of an indemnity bond, which is precisely analogous to the present bond; and the chief justice there declared, that as the penalty of the bond ascertained the damage, by consent of the parties, the plaintiff was entitled to recover no more. Equity will relieve against a penalty; but it will never go beyond it. 4 Burr. 2228. It is true, that if the plaintiff had proceeded on the original covenant, he might have recovered damages to the amount of any injury that he could prove; but having proceeded for the penalty of the bond, which was taken by way of collateral security, he has himself chosen to make that the measure of his recovery. All the cases cited on the other side, are bonds for the payment of money; except those arising under statutes; and it is not contended, that in them the damages are carried beyond the penalty, where it is given to a common informer, but only where it is given to the party aggrieved; when, perhaps, the damages actually sustained are fairly to be computed from the time the injury was done, and nothing is to be presumed from the contract of the parties. Besides, the penalty, though due, in strictness, at the expiration of six months, was only *255] payable on demand; the interest could, *therefore, only arise from the time of actual demand; and there was no evidence given at the trial of any demand having been made.

Lewis, being about to reply, was stopped by the court.

McKean, Chief Justice.—The only question before the court is, whether the jury had a power, under the circumstances of this case, to give any damages beyond the penalty of the bond: the *quantum* (which might be a subject of dispute on a motion for a new trial) is not at all involved in the point submitted to our decision.

Of the power of the jury we do not entertain a doubt. Though positive law, and judicial precedents, should be totally silent on the subject, the principles of morality, equity and good conscience, would furnish an adequate rule to influence and direct our judgment. By that rule, we must discover, that the defendant, having contracted to make a conveyance, or to pay a specific sum, within a limited time, was guilty of an immoral act, in omitting to perform either of the alternatives; and of course, he ought not to be allowed to be a gainer by the violation of his engagement. It is true, that we cannot compel him specifically to comply with the terms of the contract, as a court of chancery might do; but we can enforce the payment of a compensation for the breach; and as the breach was made in the contract, at the end of six months; when either the lands should have been conveyed, or the penalty should have been paid, the interest (which is a reasonable and moderate measure of damages) ought, in justice, to run from that period. The verdict for the whole amount is, therefore, in our opinion, moral and equitable; nor is there, I will venture to aver, any authority to impeach it, upon the strictest principles of law.

Shippen, Justice.—If the jury had undertaken to give more than 5000*l.* for the injury sustained, by the infraction of the original contract, their verdict would have been affected by the cases that have been cited. But the cases go no further; and certainly do not deny the right of the jury to

make an allowance of interest, for the detention of the money, after the time limited for its payment. Indeed, the strongest possible inference to the contrary is to be drawn from the cases cited for the defendant; for, Lord Mansfield, having asked what else the jury could give than the penalty, expressly adds "unless they had also given interest after the three months," stipulated in the contract. 4 Burr. 2228. In short, the 5000*l.*, paid with interest at this day, is not, in fact or law, more than the 5000*l.* paid, without interest, at the day it became due.

SMITH, Justice.—The plaintiff is clearly entitled to the interest, on every principle of law, morality and equity. It would have been sufficient to me, therefore, if the verdict had been *unsupported by any precedent: but I am the more strengthened in my opinion, as not a single [*256 authoritative *dictum* is to be found against it.

YEATES, Justice, concurred.

BY THE COURT.—Let judgment be entered for the plaintiff, for damages, interest and costs.

RESPUBLICA *v.* NICHOLSON.

Interest on judgment.

When a judgment is affirmed, on error, the execution may include interest from the date of the original judgment.

THIS cause had been removed by writ of error into the high court of errors and appeals, and the judgment being there affirmed, it was remitted to this court. On motion of *Ingersoll*, for the commonwealth, it was ruled—

BY THE COURT.—That in all cases, where judgments were affirmed upon writs of error, the execution may include the interest, from the date of the original judgment.

COATES'S Lessee *v.* HAMILTON.

Amendment.

BY mistake, the demise had been laid in the declaration, so as to commence before the death of the person, whose death gave rise to the controversy. *Ingersoll*, therefore, moved for leave to amend the declaration, by rectifying this mistake.

BY THE COURT.—Let the amendment be made.

HARRIS v. MANDEVILLE.[1]

Foreign discharge in bankruptcy.

In the case of British subjects, a discharge under the bankrupt law of England will protect the person of the bankrupt, in Pennsylvania.

THE plaintiff and defendant were both British subjects; the debt for which the present action was brought, had been contracted in England; and the defendant, before the suit was instituted, had obtained his certificate under a commission of bankrupt issued against him in that country.

Under these circumstances, *Heatly* obtained a rule to show cause why an *exoneretur* should not be entered on the bail-piece; and in support of the rule cited 4 Term Rep. 182; Co. Bank. Law 497.

Tilghman declined opposing the rule, being of opinion, that between British subjects, the proceedings under a British commission of bankrupts must be valid and obligatory. He said, that it had been so decided by IREDELL, Justice, in the circuit court for the district of Massachusetts (*Grenhugh* v. *Emory*), but at the same time, *the judge had judicially circumscribed the operation of a certificate under the Pennsylvania bankrupt law, within the limits of the state.

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BY THE COURT.—Let the rule be made absolute.

BEACH v. LEE.

Consideration.

Where a husband comes into possession of sufficient property, in right of his wife, this is good consideration for his express promise to pay her debt, contracted before marriage, which may be enforced, after the wife's decease.

THIS was an action on the case, brought against the defendant, under the following circumstances, which were established by evidence on the trial. The defendant's wife, previous to her marriage, had executed a bond to the plaintiff; which, at the time of her death, remained unsatisfied. It appeared, however, that, in consequence of the marriage, the defendant had become possessed of, and still enjoyed, a considerable property, belonging to his wife, more than equal to the amount of the bond; that, during her lifetime, he had assumed to pay the bond, and had actually made several partial payments on account of it; and that he had promised to pay the remainder, even subsequently to her decease.

The action was founded on the express *assumpsit;* and though it was conceded by the plaintiff's counsel, that the defendant was not liable, since the death of his wife, on the bond itself; yet, he insisted, that the bond was good evidence to prove the existence of the debt, to which the special *assumpsit* applied. See 1 Roll. Abr. 351, pl. 35; Bro. Abr. tit. Debt, pl. 180; 1 Lev. 25; Cowp. 290; Bull. N. P. 281.

But upon the facts proved, it was agreed by the counsel for the defendant, and sanctioned BY THE COURT, that the plaintiff was entitled to recover;

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[1] s. c. 2 Yeates 99.

though it was not admitted, that, without proof of the special *assumpsit*, the defendant would have been liable for the debt.

The cause was accordingly, left to the jury, merely to ascertain how much was the balance due on the bond.

M. Levy, for the plaintiff. *Lewis*, for the defendant.

WALKER *v.* DILWORTH *et al.*

Partition.

Whether a tenant by the curtesy can maintain a writ of partition, *dubitatur*.[1]

THIS was a summons in partition, on which the plaintiff, as tenant by the curtesy, demanded partition against the defendants, under the circumstances stated in the following declaration.

Philadelphia County, to wit :—Ann Dilworth, the elder, late of the said county, widow, and Ann Dilworth, the younger, late *of the same county, spinster, were summoned to answer Samuel Walker, as tenant [*258 of the curtesy of the real estate of his late wife, Elizabeth, deceased, of a plea, &c. Whereas, the said Samuel, Ann Dilworth, the elder, and Ann Dilworth, the younger, held together and undivided one messuage, &c., which the said Ann Dilworth, the elder, and the said Ann Dilworth, the younger, deny to make partition thereof between them, the said Samuel, the said Ann Dilworth, the elder, and Ann Dilworth, the younger, according to the custom of the commonwealth of Pennsylvania, and the form of the statute in such cases made and provided ; and do not permit the same to be done, unjustly and against the said custom and the form of the statute in such cases made and provided. And whereupon, the said Samuel, by John Craig Wells, his attorney, saith, that whereas, they the said Samuel, Ann, the elder, and Ann, the younger, held together and undivided the tenement aforesaid, with the appurtenances, in three equal parts to be divided, for and during the term of his natural life, and the reversion thereof to Nancy Walker, the daughter of the said Samuel, by his said wife Elizabeth; and it belongeth to the said Ann, the elder, to have one other third part of the said tenements, with the appurtenances, for and during the term of her natural life, and after her death, the remainder and reversion of the said last-mentioned third part, one moiety thereof unto the said Nancy, in severalty for ever; and the other moiety of the said last-mentioned third part, after the death of the said Ann, the elder, unto the said Ann, the younger, in severalty for ever. And it belongeth to the said Ann, the younger, to have the other third part, and residue of the tenements aforesaid, with the appurtenances, in severalty for ever: So that the said Samuel, of his third part happening to him, during his life, with the appurtenances; and the said Ann Dilworth, the elder, for and during the term of her natural life, her third part of the tenements, with the appurtenances, happening to her; and the said Ann Dilworth, the younger, her one third part of the tenements, with the appurtenances, and the reversion of the moiety of the third part happening to the said Ann Dilworth, the elder, after the death of the said Ann, the elder, to the said Ann Dilworth, the younger, in severalty for ever, they may severally improve them-

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[1] See Riker v. Darke, 4 Edw. Ch. 668; Sears v. Hyer, 1 Paige 483.

selves: But the said Ann, the elder, and Ann, the younger, deny to make partition thereof between them, according to the said custom and the statute in such case made and provided, and do not permit the same to be done, unjustly and against the said custom and the form of the statute aforesaid. Wherefore, the said Samuel says he is prejudiced, and hath sustained damages to the value of 1000*l.*, &c.

The counsel for the defendants (*Lewis*) demurred to the declaration, upon this ground, that a tenant by the curtesy cannot *maintain the *259] writ of partition; and the demurrer was opposed by *Wells*.

For the *plaintiff*, it was admitted, that partition could only be compelled at common law, between parceners; and that the 31 *Hen. VIII.*, *c.* 1, only gives the writ, where the party is seised of the inheritance: but it was contended, that the 32 *Hen. VIII.*, *c.* 32, was designed to give relief in cases not relievable at common law, nor within the provisions of the preceding statute. Thus, in Harg. Co. Litt. 175, it is stated, that tenant by the curtesy, though not named in the 32 *Hen. VIII.*, is within its equity; and in 3 Bac. Abr. 211; 16 Vin. Abr. 233; it is expressly declared, that tenant by the curtesy shall have a writ of partition on that statute. F. N. B. 336. Unless, indeed, he is allowed the benefit of this writ, he has a clear right, without an adequate remedy; for although he might bring an ejectment, and put himself in possession with the defendant, he could not divide the estate.

For the *defendants*, it was observed, that their single object in the demurrer was to take the opinion of the court; as a decision, either way, would be satisfactory to them; and they were, indeed, desirous that a partition should be effected, provided it was done in a legal and valid form, so as to bind the minor daughter of the plaintiff, who is entitled to the reversion. But it was urged, that in all the books of entries (which had been laboriously searched for the occasion), not one precedent could be found of a writ of partition, issuing at the suit of a tenant by the curtesy. The common law does not give him that remedy; the statute of the 31 *Hen. VIII.*, *c.* 1, gives it only to and against joint-tenants, and tenants in common, seised of an estate of inheritance; and though the 32 *Hen. VIII.*, *c.* 32, extends the operation of the preceding statute, by giving the writ of partition to joint-tenants, and tenants in common, seised of an inheritance, *against* tenants for life or years (embracing, by an equitable construction, the case of tenants by the curtesy, as tenants for life), it does not, *é converso*, give the writ *to* tenants for life or years, nor, consequently, constructively, to tenants by the curtesy, as tenants for life. It is true, Lord Coke says, that "the tenant by the curtesy shall have a writ of partition upon the statute of 32 *Hen. VIII.*, *c.* 32" (Co. Litt. 175 *a*); but this general *dictum*, referring to Bro. tit. Partition, 41, is not supported by the case, which was a writ of partition *against*, and not *for*, a tenant by the curtesy; the reason assigned for the *dictum*, by the commentator, "that a *præcipe* lieth against tenant by the curtesy," is a good reason, why he should be defendant, but not why he should be plaintiff, in partition; and the *dictum* is refuted by the plain language of the statute itself, as well as by the universal silence of every book *in which, if such a writ could ever have been maintained, pre- *260] cedents would most certainly have been recorded.

By the Court.—Great doubt and difficulty have arisen in this case, from the force of the arguments used by the counsel for the defendants. As, therefore, the object of the plaintiff may be safely and effectually attained by a compromise, in which the defendants declare themselves ready to unite, we wish to avoid an immediate decision of the point of law, that has been agitated.(*a*)

Roberts *v.* Cay's executors.

Action against executors.

Executors will not be ordered to plead, as of a day in the term to which the summons is returnable so as to prevent the exercise of the power of giving preference, by confession of judgment.

The act of incorporation of the Bank of Pennsylvania, which places notes discounted by it, on the footing of foreign bills of exchange, does not entitle them to priority of payment out of the assets of the deceased maker.

Many actions were brought, returnable to January term 1794, against the defendants, as executors of Cay, the surviving partner of Clow & Cay, whose affairs were exceedingly deranged; and on the 11th of January 1794 (declarations having been previously filed in all the actions), rules were obtained, "that the defendants plead as of this day, or show cause to the contrary, &c." The declarations were filed, and the rules obtained, under a suspicion (affirmed upon oath) that judgments would be confessed by the executors, to other creditors, in prejudice of the several plaintiffs in these actions, which, it was agreed, should all be governed by the decision upon an argument on any one of them.

For the *plaintiff*, it was contended by *Thomas*, that granting an imparlance (particularly where the suit was by original, setting forth the cause of action, and that, in the present instance, is done, by filing the declarations) was discretionary and matter of favor, with the court; and a variety of cases were cited, in which the imparlance was refused, or granted only upon terms that would prevent an injury to the plaintiff. Skin. 2, pl. 2; 2 Show. 310, pl. 321; 2 Wils. 381; 1 Salk. 186; Ibid. 80; Gilb. H. C. P. 42; 2 Vern. 62. A rule to enlarge the term for pleading has, indeed, been expressly refused, unless executors would agree not to plead judgments confessed subsequent to the expiration of the term. 1 Bulst. 122; 8 Mod. 308. But the principle on which executors are allowed to retain debts due to themselves, is, that they cannot sue; and not being able to sue, so as to obtain a preference in that way, the law gives it them in another. By a parity of reasoning, he who first sues, ought to be first paid. 3 Bl. Com. 18, 19; Shep. T. 479; Esp. 252; Doug. 436; Cro. Eliz. 41. It is true, that counsel, argumentatively, state, in Doug. 436, that *although an executor or administrator cannot pay a debt of the same degree, after [*261 action brought and notice given of such action, unless there is judgment for the debt which he pays; yet that he may pay such debt, after judgment; and he is entitled to give it a preference by imparlance, and pleading dilatory pleas to the first action, and in the meantime, confessing judgment

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(*a*) On this intimation, the parties entered into an amicable partition, by deed, which terminated the controversy.

for the second demand." But Buller, Justice, says, "that all legal means may be used to obtain a preference;" and as priority of suit is a legal means, entitled to countenance more than any right of favoritism on the part of executors, the only question is, whether the court will, under the circumstances of the present case, restrain the exercise of that right, which must depend upon the favor of the court, in granting imparlances, and allowing dilatory pleas.

Moylan, for the defendants, having averred, that no system of favoritism would be pursued; but that, nevertheless, the executors felt an equitable obligation to discharge, in preference, debts due from the testator for loans of friendship, and clerks' or servants' wages,(*a*) proceeded to show, by numerous quotations, that the right of an executor to give a preference to any creditor, of the same degree, was positive and unqualified. Wentw. 142, 3, 4, 5; 11 Vin. Abr. 269, pl. 4; 1 Sid. 21; Vaugh. 25; Lov. on Wills, 56; Doug. 436; Morg. Att. Vade Mecum, 196. He analysed the authorities cited for the plaintiff, and insisted, that some of them were contradictory, each to the other; that some of them were *obiter dicta*, and that some were decided in actions, whose forms and principles were not applicable to the present case: yet, that taken in the gross, a candid exposition would reconcile them to the doctrine, that wherever there was no covin or fraud, an executor may give a preference to a creditor of the same degree. It is true, that they prove, likewise, the discretionary power of the court, to allow or refuse imparlances, according to the weight of the reasons assigned: but taking into view the deranged state of the testator's affairs, at the time when the motion for pleading was made, there certainly could not be a more proper occasion, than the one now depending, for granting every possible indulgence to the executors. At that time, no assets were ascertained; and if the executors could not plead satisfactorily then, the court will not compel them to plead matter which has since occurred; for, if the rule is made absolute, it must be in relation to the state of things, at the period when the motion was made.

But so far from precipitating the executors into a premature plea, they *262] are entitled, by a liberal and fair construction of the *act of assembly, to a delay of twelve months after the testator's death, that they may ascertain the legal priority of his debts. The act of assembly(*b*) having classed debts in the order in which executors shall be bound to pay them, adds that, nevertheless, "executors or administrators shall not be prevented from, or damnified for discharging the decedent's just debts, as the same shall come to their knowledge, without regard to the priority of the same in payment, after the expiration of twelve months from the time of the said decedent's decease." If, then, twelve months are allowed to specialty creditors, for giving notice of their debts to the executors, so as to preserve the priority prescribed by the law, it is an unreasonable and

(*a*) *Moylan* offered to sign an engagement, that such preferences alone should be given; and the proposition, though not adopted, seemed to be approved both by court and bar.

(*b*) The act here referred to, has been repealed and supplied, 3 Dall. Laws, 527. It may be found, however, in Galloway's Edit. of the Province Laws, p. 32. See 1 Dall. Laws 57, c.

unjust doctrine to advance, that the executors shall, before the expiration of that period, nay, at the very first term after the death of their testator, be compelled to plead those specialties, of which they may have received no notice, but to which they are still bound to give a preference, in the course of administration. The very force of the expression, that the executors shall not be *damnified*, if they make the payment after the expiration of twelve months, proves that they would be liable for any previous payment, contrary to the legal rule of priority. There is no provision of this kind in the English statutes; for in England, a specialty creditor can only secure his preference to simple-contract creditors, by giving the legal notice of a suit, in the first instance. The reason of the diversity, however, strengthens the construction contended for. While Pennsylvania was a province (and the fact exists in a great degree, at the present day), the creditors of its inhabitants chiefly resided abroad; and if executors had been compellable to pay simple-contract debts, whenever issue could be joined by the ordinary practice of our courts; or whenever a plea could be exacted in the manner now proposed, the whole of the assets might be absorbed in such payments, before notice could be received of any preferable claims. Hence, the necessity of allowing twelve months for giving notice; and hence, justice requires that the executors should have the same period for entering their pleas to actions on simple contracts, which they must otherwise satisfy at their own peril.

For the *plaintiff*, in reply.—The act of assembly was not intended to embrace cases, in which executors were compelled to make payments by a due course of law, but only cases, in which they voluntarily undertook to discharge the testator's debts. Before the passing of the act, an executor could never voluntarily pay a simple-contract debt, without taking an indemnification *against specialty creditors; and it was only to obviate this inconvenience, that the provision was made, authorizing such [*263 payments, without regard to any priority, after the lapse of twelve months from the testator's death. But the fallacy of the opposite construction most forcibly appears, when it is remembered, that executors or administrators are required by law, to make distribution of the *residuum* of the testator's effects, among the next of kin, at the end of a year; and yet, it is said, that until the end of a year, they cannot even be compelled to make payment of his debts. Again, the law requires, that administrators shall render their accounts to the register of wills, &c., within a year; and yet, if, within the year, they are not compellable to pay the debts, there can be no accounts to render.

By the Court.—There does not exist a doubt in our minds, about the genuine meaning of the act of assembly. It would be attended with the most inconvenient and pernicious consequences, to determine, that a creditor could not compel a payment from his debtor's estate, nor even bring a suit against the executors, for a period of twelve months. The order of paying debts, obviously respects voluntary, and not compulsory, payments. Such was the construction coeval with the act; and there has not, to this time, been a single departure from it.

With respect to the other ground of argument, we were in hopes that some compromise might have been effected. But we do not hesitate to

declare, that although the court has discretionary power to grant or to refuse imparlances, we do not think, that the circumstances of the present case would justify a special interposition, to compel the executors to plead at the first term, contrary to the usual course of practice. The executors have an unquestionable right, generally speaking, to give a preference to any creditor of the same degree; and the preferences proposed to be given by the defendants, are certainly not of a covinous or illiberal nature.

The rule discharged.

Before the court had delivered their opinion on the principal case, *Ingersoll* suggested, as a collateral consideration, whether promissory notes, discounted at the Bank of Pennsylvania, were placed on a footing with protested bills of exchange, in point of priority of payment, by the following provision in the 13th section of the act of incorporation. "All notes or bills, at any time discounted by the said corporation, shall be, and they are hereby, placed on the same footing as foreign bills of exchange; so that the like remedy shall be had for the recovery thereof against the drawer and drawers, indorsee and indorsers, and with like effect, except so far as relates to damages, any law, custom or usage to the contrary thereof in anywise notwithstanding." 3 Dall. Laws, 330. *Ingersoll* observed, that previously to this provision, *there were two points of discrimination between promissory notes and bills of exchange: 1st. Promissory notes were taken by the indorsee, subject to all the equitable circumstances, to which they were subject in the hands of the indorser. 1 Dall. 441. And 2d. Protested bills of exchange were entitled to a priority in payments by executors or administrators. The legislature meant, in the case of bills and notes, discounted at the Bank of Pennsylvania, to abolish all distinction between those commercial instruments; and the expression of the act is sufficiently comprehensive to effectuate that object.

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But it was answered, by *Moylan*, *Thomas* and *M. Levy*, that the act of assembly only applied to the remedy upon a promissory note; and did not alter the nature and character of the instrument. The existing mischief, intended to be removed, was the right of set-off, claimed by the maker against the indorsee; and even upon the words of the two acts, it was remarkable, that the priority is given by the first to *protested* bills of exchange; whereas, the second places promissory notes on the same footing as *foreign* bills of exchange.

By the Court.—Though the question is not regularly before us, we have no objection to intimate our opinion, that promissory notes are not entitled to the same priority as bills of exchange. The act of assembly applies only to the case of defalcation.

Stiles, Plaintiff in error, *v.* Donaldson.[1]

Statute of limitations.—Merchants' accounts.

Unliquidated accounts between merchants, as principal and factor, are not within the statute.

Writ of Error. To an action of debt on a bond, dated in August 1774, the defendant pleaded *payment*, and gave notice of a set-off. The cause was

[1] s. c. 2 Yeates 105.

tried in the common pleas of Philadelphia county, on the 19th of November 1794, when the bond being proved, without any indorsement of a payment, for principal or interest, the defendant, by way of set-off, offered evidence to show, "that after the execution of the bond, and before the commencement of the suit, the plaintiff had become indebted to him in a sum exceeding the amount of the bond, upon accounts still remaining unliquidated and unsettled between them, as merchants, concerning the sales of merchandise made by the plaintiff, in parts beyond the sea, as agent and factor for the defendant." To the admission of this evidence, the plaintiff objected, that there was a lapse of more than seventeen years, since the date of the last item of the accounts, and no proof given of any subsequent demand of the money now proposed to be set off; and that the long acquiescence of the defendant, as well as the positive bar of the statute of limitations, *must be sufficient to prevent his recovering, or defalcating the amount. [*265 The Court below, however, admitted the evidence, upon which a verdict was found in favor of the defendant for a balance; but the plaintiff took a bill of exceptions to the decision, and brought the present writ of error to try its validity.

Ingersoll, for the defendant in error, contended, that the case of a factor was not within the act of limitations (1 Dall. Laws 95). There may be some doubt, whether the exception in the act embraces accounts between merchants, which are not a proper foundation for an action of *account-render;* but *account-render* is the appropriate remedy for a principal against his factor (3 Woodes. 83, 85); and consequently, the present case is clearly within the principle, as well as the terms, of the exception. In 1 Eq. Abr. 8, pl. 6, there is an authority nearly in point; articles furnished being allowed, under similar circumstances, as a set-off against a bond; the court declaring that a discount was natural justice in all cases; and the legislature of Pennsylvania must have entertained a similar opinion, when the general act for defalcation was passed. 1 Dall. Laws 65.

Condy, for the plaintiff in error, submitted, implicitly, to the opinion of the court, whether under the circumstances of the case, the defendant's claim on the account was barred: but if the opinion was in the affirmative, he remarked, that the jury, by finding a verdict against the plaintiff, had established the accounts barred, as a substantive demand (not merely as a set-off, according to the case in 1 Eq. Abr. 8, pl. 6); and consequently, the verdict, and the judgment upon it, were erroneous. But—

The Court were, unanimously, of opinion, that the accounts, on which the set-off had been claimed, were not within the act of limitations; and that the common pleas had done right in admitting the evidence offered by the defendant.

Judgment affirmed.

ZANTZINGER *v.* OLD.

Attachment.

A TESTATUM *ca. sa.* had issued to the the sheriff of Lancaster, upon which the party was arrested, and the money paid. But the sheriff paid it over to the nominal, instead of the real, plaintiff, though the indorsement for the use, &c., was on the writ. At the last term, *Hallowell* obtained a rule to return the *test. ca. sa.*, or to show cause this day, why an attachment should not be issued against the sheriff; and now, upon proof of service of the rule, he moved that the attachment should be awarded.

BY THE COURT.—Let the attachment issue, returnable the last day of the term.[1]

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*266] *GERMAN *v.* WAINWRIGHT.

Practice.—Non-pros.

AT the last term, a *non-pros.* had been entered by consent, on a presumption, that, at the preceding term, a rule to try or *non-pros.* had been obtained. On examining the record, however, no such rule was entered; and now *Thomas* and *E. Tilghman* objected to take off the *non-pros.* notwithstanding the mistake, unless the plaintiff was put on the same footing, as if the mistake had not happened, by entering a rule to try or *non-pros.* as of the last term, so that it might operate at the present term, should the trial be postponed by the plaintiff's *laches. Lewis*, for the plaintiff, said he thought the proposition reasonable; and the rule was entered accordingly, by order of the court.

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[1] A sheriff is not liable to an attachment, as for a contempt, in not paying into court the money made upon an execution levied upon real estate, when he has, in good faith, after the return-day, and without notice of any opposing claim, applied the money, though erroneously, to the liens upon the property. In the absence of notice to the contrary, he has a right to distribute the money; he does so, however, at his own risk; but an attachment for contempt is not included in such risk; it is only his official bond that is in peril; he is liable upon that, if he has misapplied the money. Franklin Township *v.* Osler, 91 Penn. St. 160; In re Bastian, 90 Id. 472. And as a general rule, the court will not order the proceeds of personal property to be paid into court; the sheriff must take the responsibility of distribution. Baum *v.* Brown, 11 W. N. C. 202. Nor can he himself, on his own motion, pay such fund into court; there must be a special order authorizing it. Marble Co. *v.* Burke, 5 W. N. C. 124; Dunn *v.* Megargle, 6 Id. 204. He may, however, have leave to pay the money into court, for his own protection, when there are conflicting claims to it. Kochenderfer *v.* Feigel, 5 W. N. C., 402; Kirk *v.* Ruckholdt, 7 Id. 81; Mathews *v.* Webster, Id.; Geisel *v.* Jones, Id. 82.

DECEMBER TERM, 1796.

BOUDINOT *et al.*, executors, *v.* BRADFORD. (*a*)

Revocation of will.

The revocation of a will of lands cannot be established by parol.

When a former will is attempted to be established, from the cancelling of a later one, all the facts bearing on the testator's intention to revoke, are receivable in evidence.[1]

THIS was a feigned issue, directed by the register, &c., of Philadelphia to try whether a will, dated the 28th April 1788, and republished on the 18th of October ensuing, in which the plaintiffs were named executors, was the last will of William Bradford, esquire, the deceased brother of the defendant, who claimed as in a case of intestacy. In the course of the trial, the following points were ruled :

I. The execution of the will having been proved, the *defendant's* counsel offered Dr. Rush as a witness, to testify, that the deceased, during his last illness had said, that he had destroyed his will; and that, meaning to die intestate, he had signed promissory notes, in favor of some of the members of his family, for whom he wished to make a particular provision. *It was likewise stated, that the defendant intended further to show, [*267 that long subsequently to the will in question (which it was suggested had been forgotten), the defendant had made and destroyed another will, while in the perfect possession of his reason; so that his declarations had become important, to manifest, whether, by destroying the second will, he intended to revive the first, or to die intestate.

The counsel for the *plaintiff* objected to the admission of the evidence proposed; and relied upon the sixth section of the act of assembly (1 Dall. Laws, 55), which declares, " that no will in writing, concerning any goods and chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be, in the lifetime of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by two or more witnesses." It is attempted, however, to annul a will regularly proved, and long preserved, without any one formality that the law prescribes, or common prudence, in relation to so important a concern, would naturally exact. 1 Dall. 278.

For the *defendant*, it was answered, that whether the act of cancelling the second will revived the first will, or not, was the question to be decided;

(*a*) There was a special sitting of the court, after December term 1796, from the 2d to the 5th of January 1797, for the trial of this case.

[1] s. c. 2 Yeates 170. See Flintham *v.* Bradford, 10 Penn. St. 82; s. c. 1 Pars. 153, where the general doctrine is affirmed, that the cancellation of a second will, which had revoked a former will, by implication, leaves the former will in full force, if it be retained by the testator, until his death, uncancelled; and the court say, that Boudinot *v.* Bradford "was a case *sui generis*, with strong peculiarity of facts; in which it was necessary, in the application of general principles, to mould in some degree their harmony of outline, but the strong lineaments are there." See also Lawson *v.* Morrison, *post*, p. 286.

and must depend on the declaration of the party. The evidence offered respects only the design of cancelling the second will; which was an act, that might be equivocal in itself, but was capable of being rendered definite in its object, by a contemporaneous explanation.

By the Court.—Whether Mr. Bradford made a second will, and afterwards cancelled it, are matters of fact, to be substantially and satisfactorily proved to the jury. Being so proved, another object is contemplated, which likewise assumes the nature of a fact, whether, by cancelling the second will, the deceased meant to revive the former instrument, or to die intestate; and we are at a loss to conceive how such a meaning (which it is unreasonable to expect to find in writing) should be ascertained, but by the testimony of witnesses. The evidence, indeed, will not go directly to destroy an existing will, but, merely to show, in effect, that the deceased did not intend again to make, or re-establish, a will, which he had once actually destroyed. The same point arose in *Lawson* v. *Morrison* (*post*, p. 286), and was decided in the same way by the high court of errors and appeals.

Let the witness be qualified.

II. The doctrine of express and implied revocations of wills, being much discussed during the trial, the Chief Justice, *with the concurrence *268] of the other members of the court, laid down the following positions.

McKean, Chief Justice.—1st. Where a second will is made, containing an express clause of revocation, the preceding will, though not formally cancelled, is revoked.

2d. Where a second will is destroyed, without more, the preceding will, not having been cancelled, is, generally speaking, *ipso facto* revived.

3d. Where a second will is cancelled, under circumstances that manifest an intention either to revive, or not to revive, the preceding will, those circumstances must be proved.

4th. The mere act of making a second testament, is a revocation of a preceding testament, in relation to personal estate; the law throwing the personal estate on the executor as a trustee.

III. It was suggested by *Ingersoll*, that, in England, an executor is entitled in his own right to the *residuum* of personal estate, undisposed of by the will; whereas, in Pennsylvania, the executor holds it only as trustee for the next of kin. But—

By the Court.—There is no such distinction to be found in any act of assembly, or judicial determination. The next of kin are only entitled to personal estate, in the case of intestacy; and a man cannot be intestate, who has made an executor.[1]

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[1] This is merely a *dictum* of the Chief Justice, not concurred in by the court. In Grasser v. Eckart, 1 Binn. 580, Judge Smith said, "I took very full notes of that case (Boudinot v. Bradford), and they contain nothing in relation to the point said to have been decided; it certainly was not the opinion of the court." And in the same case, Judge Yeates said, "The opinion attributed to the court, I recollect, fell from the Chief Justice; it was a sudden answer to a point raised by Mr. Ingersoll, but there was no decision of the kind by the court." And *per* Tilghman, C. J., "We do not consider the point as ever having been judicially decided, although, certainly, the opinion thrown out by C. J. McKean, 2 Dall. 268, is entitled to great

The principal point in the cause turned upon the state of Mr. Bradford's mind, at the time of cancelling the second will and declaring his intention to die intestate; and the jury being of opinion, from the evidence, that he was then in possession of a competent understanding, found a

Verdict for the defendant.

Ingersoll and *R. Stockton* (of New Jersey), for the plaintiff. *Lewis*, *M. Levy*, and *Todd*, for the defendant.

Greene's Case.[1]

Witness.

In proceedings in insolvency, a creditor is a competent witness, to prove fraud in the debtor.

George Greene having petitioned for a discharge under the laws for the relief of insolvent debtors, one of his creditors was offered as a witness, to prove that several judgments had been confessed by the petitioner, without a valuable consideration, and with a view to defraud. It was objected, that a creditor was not a competent witness; as his testimony would go to invalidate the judgments, as well as to the imprisonment of the petitioner.

By the Court.—This is a question of fraud; and we can perceive no just reason, why a creditor should not be examined to ascertain whether, on that ground, the petitioner ought *to be remanded. The evidence can never affect the judgments; nor be admitted, on any other [*269 occasion, to maintain the personal interest of the witness. Let him be sworn.

After a long opposition, however, the petitioner was discharged.

McKean, *Dallas* and *S. Levy*, for the petitioner. *M. Levy*, *Hallowell* and *Thomas*, for the creditors.

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consideration; that opinion was not delivered by the court, but by the Chief Justice; nor was there any argument upon it; it was not before the court for decision" (p. 584). And in Wilson *v.* Wilson, 3 Binn. 561, Chief Justice Tilghman said: "This report is certainly inaccurate, in more respects than one. The *dictum* was not by the *court*, but by the Chief Justice *only;* nor did the other judges express any opinion, or consider the point alluded to, as having been decided. This has been several times declared by the late Judge Smith, both in private, and in his seat on the bench; and I know that his notes make no mention of any such decision. The opinion of Chief Justice McKean I shall always consider as very respectable, but not to be compared to a decision of the court. There must be a mistake, however, as to his having said, that the next of kin could *only* take, in case of an intestacy; for he well knew, that when a *legacy* is given to the executor, he is considered as a trustee for the benefit of the next of kin." But see the remarks of Judge Yeates, in the same case, p. 566, and the case of Davis *v.* Davis, cited by him, as having been decided by Wilson, P. J., in Delaware county, in April 1806.

[1] S. C. 1 Yeates 166, and see Ingraham on Insolvency 106. The contrary was held by the supreme court of Delaware, in Edwards *v.* Townsend, 3 Houston 100, where the editor was of counsel for the opposing creditors.

EWING v. MCNAIR.

Practice.—Execution.

When judgment is had in term, an execution may be made returnable to the last day of the same term, for the purpose of founding a *testatum*.

JUDGMENT was entered in this cause, on the first day of September term, 1796; and the plaintiff issued a *testatum fi. fa.* to Allegheny county, founded on a *fi. fa.* to the sheriff of Philadelphia county, which was made returnable on the last day of September term 1796, but had never been actually taken out, though it was minuted on the roll. The *testatum fi. fa.* being levied on lands, *E. Tilghman* now moved to set the writ aside, as being founded on a *fi. fa.* not legally or properly returnable. But—

BY THE COURT.—The present case appears manifestly to be included in the words of the act of assembly, which declares, "that the last day, as well as the first day, of every term, shall be a common day of return in this court, at either of which periods any writs, original, mesne or judicial process, &c., may be made returnable; and that the writs and process returnable on the last day of the term, shall be as valid and effectual in all cases, and to all intents and purposes, as if the same had been made returnable on the first day of the term." 3 Dall. Laws, 770.

We do not mean, however, to give any opinion, at this time, as to the effect of such a proceeding, in charging bail, or levying upon lands within the county in which the judgment was rendered.[1]

Rule refused.

MARCH TERM, 1797.

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*270] *VASSE v. BALL.[2]

Decree of prize court.—Forfeiture.

In an action upon a policy of insurance, the decree of a foreign court of prize is not conclusive against the assured.

A small matter of dutiable or prohibited goods, is not sufficient to condemn a vessel.

THIS was an action on two policies of insurance for $28,000, upon the brig Salmon, and her cargo (both the property of the plaintiff, an American citizen), from Port au Paix to Philadelphia, in which these clauses were inserted: "It is declared, that this assurance is made only against capture of the British, or any of the subjects of Great Britain." "The brig is warranted to be an American bottom; and the cargo of the said brig to be American property."

On the trial, the following appeared to be the material facts: The brig, having carried a cargo of flour from Philadelphia to Port au Paix, under a contract with Mr. Fauchet, the French minister, was captured and taken into Bermuda, for adjudication, by a British privateer, on her return to Philadelphia. The master of the brig wrote to the plaintiff, his owner, stating the capture, and declaring the strongest apprehension, that a condemnation

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[1] See Baker v. Smith, 4 Yeates 185. [2] s. c. 2 Yeates 178.

would ensue, as the captors had got possession of the receipt for the flour delivered upon the contract with Mr. Fauchet, and he had been compelled at Port au Paix, to take on board a French officer and a few soldiers (who were all invalids), with their baggage and some articles of household furniture, in order to bring them for their health to America. The plaintiff communicated the capture to the defendant, and in explicit terms, represented the case to be a desperate one; but the defendant, with confidence, declared, that, as a new governor had been recently sent out to Bermuda, there would be a change in the administration of justice; so that if the property was *bonâ fide* American, it would certainly be acquitted; and in that confidence, he agreed to insure the vessel and cargo for a premium of ten per cent. At the time of making this agreement, the master's letter was not shown to the defendant; but the evidence raised a strong presumption that it was produced and read to him, at a subsequent meeting, before the policies were underwritten.

The brig and cargo being libelled in the vice-admiralty court of Bermuda the libel set forth the following allegations as causes of condemnation: 1st. That the vessel and cargo were French property. 2d. That the vessel was *an American transport, in the French service, employed to carry flour and soldiers to and from French ports. 3d. That the vessel had been employed in carrying dispatches for the French government. 4th. That the vessel had been employed in trading with the enemies of Great Britain, supplying them with the means of sustenance and of war. 5th. That the port from which the vessel came was in a state of blockade. The judge of the vice-admiralty pronounced a general decree of condemnation upon both vessel and cargo, without specifying any particular cause of forfeiture. [*271

Under these circumstances, *Ingersoll* and *Du Ponceau*, for the plaintiff, contended, that they were entitled to show, that the brig and cargo were *bonâ fide* American property; that, if so, the warranty had been complied with; and that no other ground alleged in the libel was a just cause of capture and condemnation to discharge the underwriter. It is true, that the ancient cases say, generally, that foreign judgments are conclusive, without distinguishing between the judgments of courts of admiralty, and other courts; but modern adjudications have more accurately settled, that, a foreign judgment shall be deemed *prima facie* evidence, but, like all other evidence, it is liable to examination. Doug. 6; 4 T. R. 493; Bull. N. P. 245; 2 Show. 232 (Leach's Edit. in not.) (*a*). The sentence may justly be conclusive between those who are parties to it, and must, *ex necessitate*, be conclusive upon the subject to which it immediately applies: but it ought not to be binding on third persons, with collateral interests; nor upon objects which it never contemplated. There has been a great fluctuation in the English decisions upon points of commercial law. The insurance of enemy's property has, at one time, been held lawful; but Lord Mansfield's decisions on that point, have been recently overruled. Park 239 (last Edit.). And it is well known, that the English courts of vice-admiralty do not decide accord-

(*a*) McKean, Chief Justice.—The idea that a sentence of a court of admiralty is conclusive, arises from this consideration, that the court always proceeds *in rem*. The decree naturally and necessarily binds the subject of the proceeding, a ship or cargo; and any person purchasing under the decree will, of course, be secure.

ing to the law of nations, but according to the instructions of the crown. But there is not, in fact, any judicial determination of the English courts, antecedent to the American revolution, which declares, that the sentence of a court of admiralty cannot be examined and controverted between persons who were not parties to it. The case of *Bernardi* v. *Motteux*, Doug. 554, occurred since the revolution; it has, therefore, no obligatory influence; *272] and it carries the doctrine, respecting the conclusive *character of a sentence in a foreign court of admiralty, to an extent so extravagant, that American tribunals should be well convinced of the reason and justice of the position on which it turns, before they voluntarily acquiesce in the decision. Besides, this is not a question of English municipal law, in which the judgment of an English court must be respected, as evidence of the law: but it is a question arising on the law of nations; and if there is a diversity of opinion in the courts of different nations, every nation is at liberty to examine the principle. Thus, then, it has been determined in France, that the sentence of a court of admiralty is not conclusive in a controversy between the underwriters and the assured. Emerigon (a writer celebrated even in Westminster Hall) says: "*Il est donc certain, que les assureurs répondent de la confiscation injuste prononcée par le tribunal du lieu ou le navire pris a été conduit. Les jugemens rendus par les tribunaux étrangers ne sont en France d'aucun poids contre les François, et qu'il faut que la cause y soit de nouveau decidée. D'où il suit, que le jugement de confiscation prononcé par un tribunal ennemi, n'est ni une preuve que le veritable pour comte ait été caché, ni un titre que les assureurs puissent alléguer pour se dispenser de payer la perte. Telle est notre jurisprudence.*" 1 Emer. 457-8. (*a*) Great Britain, as an underwriting nation, has an obvious interest in maintaining a contrary doctrine; but, as the policy does not apply to the situation of America, the practice ought not to be adopted.

Even, however, if the sentence of a court of admiralty were to be considered as conclusive as the strongest of the English cases can justify, the present cause would not be affected; for, it can only be conclusive upon what it appears to have decided; and it is impossible, from the present decree, to ascertain the ground of condemnation. In that respect, this cause is analogous to the case of *Bernardi* v. *Motteux*, Doug. 555; the general warranty being there as forcible, as the additional clause in the policies now controverted. Under every warranty, then, the only question is, what the parties meant. Park, Ins. 410, 392–5, 492; Ib. 301 (last Edit.). Here, they plainly meant, that, if the property assured was American, the underwriters *273] should be bound to pay. But, it is answered, the libel *alleged the property to be French, the condemnation is general, and the decree is conclusive. It must be observed, however, that the libel alleges more; and that the allegations are in direct contradiction to each other; for, if the

(*a*) "It is certain, that the underwriters must be responsible, in the case of an unjust confiscation, pronounced by the tribunal of the place, to which the captured vessel has been conducted. Judgments rendered by foreign tribunals are of no weight in France, against Frenchmen; and the cause must there be decided *de novo*. Hence, it follows, that the sentence of confiscation pronounced by the tribunal of an enemy, is neither a proof that the real owner has been concealed; nor a title which the underwriters can allege, to avoid paying the loss. Such is our law."

vessel and cargo were French property, they could not, likewise be, as all the other allegations import, American property; and when the plaintiff can show, that it was impossible the decree should be on the ground of French property, it must be presumed to have proceeded on the other grounds stated in the libel. As to those other grounds, it is enough cursorily to observe, that the defendant has in vain endeavored to prove, that the vessel was employed in a trade with the French islands, not permitted before the war; that the transportation of a few, unarmed invalids, cannot be denominated contraband; nor will their personal baggage and furniture come within the description of the cargo; Park, Ins.; Bunb. 232; Str. 943; 1 Dall. 197;(*a*) and that the rest of the allegations are not causes of condemnation upon any principle of the law of nations.

The defence was supported by *Lewis*, *E. Tilghman* and *Rawle*, on three grounds: 1st. That there was a concealment from the underwriter of the facts, known to the assured, that flour had been exported in the vessel for the French minister, and that there were French soldiers and their property on board, at the time of the capture. 2d. That the warranty had not been literally fulfilled, as a part of the property on board was French, and furniture must be considered as part of the cargo; and it is immaterial, whether the loss is owing to a breach of the warranty or not, if the warranty has not been strictly complied with, even in a trifling circumstance; *à fortiori*, in a circumstance of such importance. Park, Ins. 318; 1 T. R. 345; 3 Ibid. 360; Cowp. 607. 3d. That the sentence of the court of vice-admiralty is conclusive. Whatever was meant to be decided, shall be for ever at rest. Park, Ins. 354; Doug. 544. And in a great variety of cases, it is held, that when there is a warranty of neutral property, and the condemnation is general, the decree shall be conclusive; which is likewise the law, when the sentence is given on the very point of the warranty. 2 Str. 743; Skin. 59; 3 Show. 232; T. Raym. 473; Carth. 34; Salk. 32.

McKean, Chief Justice.—The same difficulty, that occurred in the case of *Bernardi* v. *Motteux*, Doug. 555, certainly occurs in the present case—how is the ground of condemnation to be ascertained? The libel asserts in one place, that the property *is French; in another place, that it is American; and the several statements that the vessel was employed [*274 in assisting or supplying the French, also imply that it belonged to a neutral owner. The decree, however, is general: but can we impute to it, the absurdity of meaning to decide, that the vessel and cargo were, at the same time, neutral and enemy property?

Shippen, Justice.—If the libel had confined itself to allege, that the property was French, and the decree had been general; or, if the decree had specifically selected and stated that allegation, as the ground of condemnation, I should have been strongly inclined to think, that we were bound by the decision. But the object of the present inquiry is, to ascertain for what cause the vessel and cargo have been confiscated?

(*a*) Shippen, Justice.—The strongest case on the question of a cargo, is that in Bunb. 232. I remember, that before the revolution, there was a seizure of a Palatine vessel with passengers, on account of the baggage; but I acquitted her, on the authority of that case.

The counsel for the *defendant*, perceiving the bias of the court so much against them, declined pressing any further the argument in support of the binding nature of the decree of condemnation; and left their case to the jury, simply upon the plaintiff's alleged concealment of the information contained in the master's letter, communicating the capture of the vessel. The opposite counsel having, thereupon, proved that the plaintiff was an American citizen, and sole owner of the vessel and cargo, the following charge was delivered by the chief justice, after a general recapitulation of the facts :—

McKean, Chief Justice.—The first ground of defence attempted to be taken on this occasion, is—that the vessel was engaged in a trade with the French islands, which, as it was not permitted by the French government, previously to the war, Great Britain, it is said, had a right to deem unlawful, and to construe into a violation of our neutrality. The fact has not been established : but if it had been established, I could not accede to the conclusion which the defendant's counsel contemplated. I cannot conceive, upon what principle, our accepting a benefit, is to be converted into the perpetration of a wrong. What injury can be done to any belligerent power, by our sending the exports of America (not of a contraband nature) to a new market? Where is the cause of offence? In what consists the infraction of neutrality? We are not actuated by motives of partiality and favoritism, for we are willing, of our own accord, to pursue the same course with Great Britain, as well as France; and we find that, in fact, the colonial governments of Great Britain often invite us, during a war, to an intercourse in trade, which is, at other times, absolutely interdicted. We cannot prevent another nation from offering a bounty to our commerce, by opening a free port, or by relinquishing its duties ; and when we merely accept these advantages, on a principle of self-interest, why shall we be charged with a breach of our neutrality? No: the rule, on the point of neutrality, is just and clear : it is *simply this : If two nations are at war, a neutral *275] power shall not do any act, in favor of the commercial or military operations of one of them ; or, in other words, it shall not, by treaty, afford a succor, or grant a privilege, which was not stipnlated for, previously to the commencement of hostilities.

The second ground of defence is founded on the capture and condemnation of the vessel at Bermuda. It is urged, that the libel states the property to be French; and that the decree, being general, affirms that allegation. But the libel consists of five charges; and if the charge of French property is affirmed, the other four, which stand precisely on the same footing, must be arbitrarily excluded; since, under different modifications, they allege the property to be American. It is impracticable, therefore, to fix the precise cause of condemnation, by an inspection of the record itself; but we are clearly of opinion, that, under such circumstances, evidence may be received to establish the American ownership, in conformity to the warranty. As, then, the proof leaves no doubt on the question of ownership, we cannot presume that the judge of a foreign court has perjured himself, by declaring that property to be French, which we know to be American ; and of course, we must assume the position, that his decree proceeded upon the other allegations of the libel. Those other allegations do not furnish any cause for

cancelling the policies, in the present case, either in relation to the express warranty, or to the matter charged. An American citizen may, lawfully, at any time, carry flour and other articles of provision, or dispatches, for a French minister, from an American to a French port.

The third ground of defence states, that there was a concealment of some material facts, in regard to the risk, which were known to the plaintiff, at the time of the defendant's undertaking the insurance—such as the outward transportation of a cargo of flour for Mr. Fauchet, and the homeward accommodation of French soldiers, with their baggage. If this statement be correct in point of evidence, the law arising from it is certainly in favor of the defendant; but the weight of the testimony does not seem to support it. There can be no imputation of concealment, where each party had an equal opportunity of acquiring a knowledge of the fact; and there is strong reason to believe, if not direct evidence to show, that the plaintiff gave the defendant that opportunity, by placing in his hands the master's letter, reciting all the circumstances. If the defendant then refused or neglected to read the letter, it cannot now be assigned as a cause for vitiating the policies. Besides, if all the circumstances had been perfectly understood, there was nothing which any lawyer would have pronounced to be illicit in the trade. The cargo of flour was at the risk of the plaintiff, until it was *actually delivered; and I have never heard of any law, in any civilized nation, that deemed it contraband, or unlawful, to carry a few, [*276 unarmed, invalid soldiers, to a neutral country, in pursuit of health and refreshment.

A fourth ground of defence has been taken, upon this consideration, that the household furniture of the passengers came within the description of the cargo of the vessel; and therefore, the warranty had not been strictly performed. I confess, that I agree in the general idea, that household furniture cannot be regarded as baggage, and must constitute a part of the cargo; but still, to admit this exception, under the peculiar circumstances of the shipment, would be too indulgent to a harsh and captious spirit of litigation; nor, throughout the history of admiralty proceedings, can there be traced a single instance of condemnation, for such a cause.

Upon the whole, it is our opinion, that the plaintiff is entitled to recover the amount of both policies.

Verdict for the plaintiff.(*a*)

(*a*) At the close of the charge, *Tilghman* claimed leave to tender a bill of exceptions, because the court did not direct the jury, in point of law, to consider the decree as conclusive.

By the Court.—We do not say what would have been our opinion, if the decree had expressly condemned the property as French; but in its present state, we do not think it conclusive, to prevent evidence that the cargo was actually neutral.

The defendant afterwards moved for a new trial, but it was refused. He then brought a writ of error; but, on the 13th of July 1797, the judgment, entered in pursuance of the verdict, was affirmed.

YOUNG *v.* WILLING.

Insolvent.

After a discharge in insolvency, the insolvent cannot sue in his own name, upon a prior cause of action.

THIS was an action of trover, instituted in September term 1794, to recover the value of certain public certificates, which the plaintiff claimed as his property. It appeared on the trial, however, that he had sold the certificates to the defendants, in November 1784, that his present claim was founded on a supposed disaffirmance of the sale (the circumstance, of which it is unnecessary to state), when the certificates were discovered to be counterfeit, in the month of December following; and that the action was instituted in his own name, though he had been discharged under the laws for the relief of insolvent debtors, in September 1785, after making a general assignment of his property, for the benefit of his creditors. On the opening of the defence, THE COURT thought the merits were in favor of the *277] *defendant; but being of opinion, that, at all events, the action could not be maintained in the plaintiff's name, they directed a nonsuit; which was, accordingly, entered.

Wilcocks, *Rawle* and *Hallowell*, for the plaintiff. *Ingersoll*, *Lewis* and *Dallas*, for the defendants.

MCCARTY *v.* EMLEN.

Foreign attachment.

When one of two copartners is deceased, and the survivor sues for a firm debt, the moiety thereof, coming to such survivor, cannot be attached by his separate creditor.

THIS action was brought to September term 1789, by the plaintiff, as surviving partner of Cummings, to recover a debt due to the partnership. On the 4th of March 1793, the matters in dispute were referred; on the 21st of January 1795, there was a report filed, finding 165*l.* 0*s.* 11*d.*, in favor of the plaintiff; and thereupon, judgment *nisi* was entered. But it appeared, that a foreign attachment had been issued, in the Philadelphia common pleas, returnable to March term 1793, in the name of Elizabeth Pringle, administratrix of John Pringle, against William McCarty, the present plaintiff, for a debt due by him, in his separate individual capacity, to the deceased intestate; and that the attachment had been served upon effects, &c., in the hands of Emlen, the present defendant, who was a debtor to the partnership of McCarty & Cummings, but did not owe anything to McCarty, in his separate right.

On the 24th of January 1795, *E. Tilghman* and *Wilcocks*, for the defendant, obtained a rule to show cause why the execution in this action should not be stayed, until an indemnification is had against the foreign attachment of *Pringle*, administratrix, v. *McCarty*. And after argument, upon a case, stating the preceding facts (*Ingersoll* appearing for the plaintiff), the judges delivered their opinion, *seriatim*, to the following effect:

MCKEAN, Chief Justice.—The question in this cause is—whether the debt due from Emlen to the late partnership of McCarty & Cummings, has been

secured by the foreign attachment, in favor of McCarty's separate creditor, or can only be discharged by a payment to the surviving partner?

Two objections are urged against the claim under the attachment: 1st. That the present action was commenced by the surviving partner, before the attachment was laid; and a debt in suit is not attachable. 2d. That the attachment is brought to recover a debt due from McCarty in his separate capacity; whereas, the debt attached is due from the garnishee to the company of McCarty & Cummings; and the partnership debts (which, it is said, are not yet settled) must first be paid out of the partnership funds.

But it is to be observed, on the first objection, that, although a debt in suit is not attachable in England, because the superior *courts of that country will not, in the plenitude of their authority, permit subjects [*278 depending before them to be affected by the process of inferior tribunals, exercising a jurisdiction by special custom; yet, here, the same cause does not operate, as the supreme and county courts have a co-ordinate, concurrent jurisdiction in other suits, as well as in cases of attachment; and of course, the effect is not, necessarily, the same. But on general principles of justice and reason, it would be difficult to satisfy the mind, why money should not be attached in the hands of a debtor, as well after, as before, the person to whom it is due, has sued for it. If justice and reason are not opposed to it, public policy and convenience strongly recommend it. Many foreigners, resident abroad, enjoy an extensive credit from one class of citizens in this country, on account of the debts which are known to be due to them from another class; and if nothing more were necessary to shelter such foreigners from the effects of an attachment, than to bring suits against their debtors, it is obvious, that the fund which constitutes the principal security of the American trader, might be easily and irretrievably withdrawn. The court are, therefore, unanimously of opinion, that the debt due from Emlen to McCarty & Cummings, might lawfully be attached, notwithstanding the suit previously instituted by the surviving partner to recover it.

On the second objection, it must be observed, as a general rule, that partnership effects are first to be appropriated to the payment of partnership debts: but this, like every other general rule, admits of exceptions; and is hardly, indeed, susceptible of a strict application in any cases, but those of bankruptcy, insolvency and execution. The consequence of its application to partnerships would be highly injurious to trade, and embarrassing to justice. A partner may owe separate debts; and his property may consist of partnership stock; yet, if the objection prevails, it is impossible to conceive when the separate creditors will be able to make that property responsible. While the partnership continues, how shall they compel a disclosure and liquidation of all the debits and credits of the company? and even when a partnership is dissolved, where will separate creditors find the inclination, or the power, to scrutinize and close the records of a long and complicated mercantile connection? But the law is happily otherwise: for it has been repeatedly settled here, as well as in England, that a partner may be sued for separate debts; that the partnership effects may be taken in execution and sold by moieties; and that the purchaser of the moiety, under the execution, shall be considered as tenant in common with the partner, owning the other

moiety. The case in Doug. 650, is, in my judgment, conclusive upon this point.

*279] *The result of the view which I have taken upon the subject, is: that the defendant in this action, is liable as garnishee in the foreign attachment to pay to the representative of John Pringle, one moiety (or whatever may have been McCarty's partnership proportion) of the debt due to McCarty & Cummings.

SHIPPEN, Justice.—I concur in the opinion which has been delivered. The doctrine, that debts in suit cannot be attached, depends entirely upon the superior dignity of the courts in England, before whom the suits must be instituted; but as the same kind of process issue in Pennsylvania from both descriptions of courts, there is no dignity to be violated here, by allowing the attachment.

As to the claim on account of the partnership, it appears pregnant with the greatest inconveniences. An honest, separate creditor, though he had obtained, by attachment, a fair and legal lien upon the debt, would thus be compelled to wait in suspense, during an indefinite period, for the settlement of every partnership account.

YEATES, Justice.—The act of assembly pursues, in general, the custom of London, on the subject of foreign attachments: but the decisions that prevent the operation of attachments, in the case of debts in suits, are evidently founded on that jealousy of the superior courts in England, for which, in this state, there exists no cause; since the process, for both kinds of suits, issues from both descriptions of courts. The preamble of the act, indeed, declares the propriety and the intention, to put the effects of absent debtors, and of debtors dwelling upon the spot, on an equal footing, for making restitution for debts (1 Dall. Laws, 60); but that intention would be easily frustrated, if every foreigner, by instituting a suit, could furnish a bar to the attachment: our courts would, in effect, be still open to non-residents, but shut against their creditors. Even, however, in England, while the superior courts refuse to give the effect described, to foreign attachments issuing from an inferior tribunal, they have exercised their own authority in a manner very similar to that which is now contemplated; by ordering the sheriff to retain in his hands, for the use of the plaintiff in one action, a sum of money which he had levied for the defendant at his suit, in another action. Doug. 219.

But on the second objection, I have the misfortune to differ from the opinion entertained by my brethren: for I think, it has been long and clearly settled, upon principles of natural justice, and commercial convenience, that joint effects shall first be applied to the payment of joint debts; and that the separate creditor of a partner shall not be let in to a share of the partnership property, until the whole of the partnership debts are satisfied. 2 Vern. 293, 706; 1 Ves. 242, 497; Cowp. 449; P. Wms. 183. *It is only a moiety, therefore, of the surplus of the joint stock of McCarty & Cummings, after paying every lawful claim against the company, that can, in my opinion, be liable to the attachment instituted by Pringle's administratrix against McCarty, to recover a separate debt.

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SMITH, Justice.—As I agree with the Chief Justice, in every point of his

opinion, for the reasons which he has assigned, it would be superfluous to express more than a general concurrence in the judgment of the court.

By the Court.—Let one moiety of the money attached be paid by the garnishee, to the administratrix of John Pringle; and let the other moiety be paid to the plaintiff in this action.

DECEMBER TERM, 1797.

Camberling v. McCall.[1]

Marine insurance.—Action for loss.

No action will lie upon a policy of insurance, until the expiration of three months from the proof of loss, contrary to a provision to that effect therein contained.

This was an action on the case, on a policy of insurance, dated the 28th of October 1786, on the schooner John, Nathaniel Simmons, master, on a voyage from Bath, or Washington, in North Carolina, to the Island of St. Thomas. It was a valued policy, in which the plaintiff's moiety of the schooner was valued at 300*l.*; and the action was brought for a total loss.

The cause was first tried by a special jury, in September term 1796, when a general verdict was found for the plaintiff, with $289.84 damages; but, in consequence of an agreement between the counsel, there was a second trial, in March term 1797, when the jury found a special verdict, in these terms.

"And now, at March term, A. D. 1797, to wit, on the twenty-fourth of the said month, a jury, to wit, &c., being duly impanelled, tried, sworn and affirmed, respectively, to try the issues joined between the parties aforesaid, on their oaths and affirmations aforesaid, say, that on the 28th October 1786, the plaintiff, then and ever since, resided in the state of North Carolina, was owner of one-half of the schooner in the declaration mentioned, her tackle, apparel and furniture, of the value of three hundred pounds, lawful money of Pennsylvania, and on *same day caused the same to be insured [*281 (*prout* policy), which on the day and year aforesaid, at the county aforesaid, for the consideration or premium therein mentioned, was underwritten by the defendant, for the sum of one hundred pounds, lawful money, for the voyage in the said policy mentioned; that the said schooner, on or about the ninth day of November 1786, was cleared out, and sailed on the voyage in the policy mentioned, and to the knowledge of the said jurors, has never since been heard of; from whence, the jury presume that the said vessel and cargo were sunk and totally lost; that some time in the year 1787, the captain and seamen who sailed in said schooner, on the voyage aforesaid, were in the state of Virginia, and notice thereof was, afterwards, and before the date of the plaintiff's letter, of the first of November 1792, given to the plaintiff; but at what particular time, the jurors know not; that the plaintiff did not give any notice thereof, or of the supposed loss of

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[1] s. c. 2 Yeates 281.

of the said schooner, to the defendant, until the first day of November 1792, when the plaintiff informed the defendant by letter, that the said schooner had sailed about the ninth of November 1786, on the voyage in the policy mentioned, and that he had not since seen nor heard from the said captain, nor received any part of the property in the vessel or cargo, nor had any person on his behalf; which information the jury find to be true; and the said jurors further find, that the plaintiff did not abandon to the defendant, and to the other underwriters, on the said policy, or to either of them, his property in the said schooner, or any part thereof, before the bringing of the said action; nor has he since abandoned the same; nor was any other proof made of the said loss, previously to the bringing of the said action, than the information, given as aforesaid, by the plaintiff to the defendant. And the jurors aforesaid further find, that John Kaighn, one of the partners of Kaighn & Attmore, who effected the said insurance, as agent of the plaintiff, has ever since resided in the city of Philadelphia, and had, until the present action was brought, the policy aforesaid in his possession; and that the defendant has, ever since the date of the said policy, resided in the city of Philadelphia. If, upon these facts, the law be with the plaintiff, they find for the plaintiff, and assess damages to the amount of ninety-eight pounds, with interest from December 1st, 1794, amounting in the whole to ———, with six pence costs; but if the law be with the defendant, they find for the defendant."

The arguments before the jury, on the trials, and before the court, on the special verdict, were, in substance, as follows:

For the plaintiff, *M. Levy* insisted, that every fact which could be necessary to entitle his client to recover, was found by *the special verdict: *282] for when a vessel has never been heard of, after such a lapse of time, the legal presumption is, that she is lost. 2 Str. 1199; Park, 71–2.

For the defendant, *Lewis* urged two points: 1st. That proof of a loss had not been made, three months previously to the commencement of the present action, agreeable to the stipulation contained in the policy. 2d. That the assured had never abandoned to the underwriters.

On the first point, he observed, that the memorandum at the foot of the policy provided, that "in case of a loss, the money shall be paid in three months after proof of the same;" and if the underwriter was entitled to three months for making payment, after the proof had been exhibited, there was no cause of action, at the time this suit was instituted. Some previous evidence of the loss was indispensable, by the express agreement of the parties. The nature of the evidence is not particularly defined; but the protest of the master, the affidavit of one of the seamen, or some other credible attestation of the fact, should have been furnished. If a creditor agrees to give a day for the payment, after a certain event takes place, he cannot sue before that day arrives. In the present instance, it is not sufficient to make the proof in court; it should be made *en pais*; as in the case in Palmer, 160, where the ground of action was a declaration by the defendant, that "after you have proved that I struck you, &c., then I do assume to pay you 20*l*." The plaintiff's letter, demanding payment of the underwriters, was dated the 1st of November 1792; and the suit was instituted the 1st of January 1793. The objection must, therefore, be fatal to the right of action.

On the second point, it was insisted, that the duty of the assured required him to give notice of the loss, in a reasonable time, and to abandon to the underwriter. Park, 71–2, 161; 2 Mag. Ins. 174, 177. Had this been done, the underwriter would have been enabled to make a diligent and seasonable inquiry after the vessel; which may have not been found, because she has not been properly sought for. Six years elapsed between the date of the policy, and the notice of the loss. The delay is unreasonable; and, if it does not entirely destroy all means of investigation, must certainly increase to the underwriter, the uncertainty and difficulty of ascertaining the reality of the loss; while it opens a door to the assured for the perpetration of the greatest frands. It is for this reason, that the law not only requires an abandonment, in such cases, but the abandonment should be made on the first opportunity; and that, even where there is no hope of recovering any part of the property. It is like the case of notice to the drawer of a bill of exchange, when the drawee refuses payment. 1 T. R. 613–4; *Wesk. p. 5, § 15; Ibid. p. 344, § 3; Ibid. 546, § 4; 2 Mag. 174; 2 Emerig. 173. [*283

In reply, *M. Levy* observed, on the first point, that the proof of the loss arose, in legal contemplation, from the fact, that the vessel had sailed, but for an unreasonable length of time had not been heard of; and therefore, he insisted, that it was not necessary to make the proof of loss at the insurance office, three months before the right of action accrued.

In answering the second point, he treated the idea of an abandonment, where no portion of the property was saved, as novel, unprecedented and absurd. The term *abandonment* has received a fixed and definite signification; to which, it is essential, that something should be saved, in order that something may be abandoned. Park, 161; 1 T. R. 613–4. The real purpose for requiring an abandonment, must be to transfer to the underwriters the property and the means of reclaiming and preserving it, which must otherwise continue in the assured. But when it is demonstratively obvious, that the subject-matter has utterly ceased to exist; that the loss is total and final; as where a ship has been consumed by fire, or has sunk in the ocean; what can be the use or benefit of an abandonment? And if there can be no use, *lex neminem cogit ad vana sue impossibilia.* The fallacy of the opposite argument lies in an application of the duties which the law has imposed upon the assured, in the case of one description of a total loss, to a total loss of an entirely different description. The term "total loss," in relation to insurances, is technical; and includes, as appears from Park, 110, 61, two species; one, where a part of the property has been saved, and still exists; the other, where the whole property is utterly destroyed. In the former case, abandonment is necessary to the safety of the insurer; it is the title, without which he cannot reclaim the *residuum,* nor exercise those acts of ownership, that are essential to reduce it to possession. But in the latter case, no such purpose can be contemplated or attained; and the common sense of mankind would be startled at the idea, that it was necessary to give up to another, the ownership of a thing, not in being; of a thing which had been completely annihilated. To require this useless and absurd act from the assured, under the heavy penalty of forfeiting his insurance, would be wantonly oppressive and unjust. The analogy stated by the opposite counsel between notice of abandonment, and notice of a protested bill of exchange,

is admitted and adopted: but it must be recollected, that the holder of the bill, neglecting to give notice, only loses his recourse upon the drawer, in case the drawee had effects in his hands; for, if the drawee had no effects, there need not be notice given of the refusal to accept or pay; and the holder shall not lose his debt for omitting *to give a notice, which could be *284] of no use to the drawer. 1 T. R. 410. The principle and authority of the cases are the same. If anything exists, that can be abandoned, the insurer ought to have notice; but if a notice can be of no use to him, there can be no reason why he should receive it, any more than the drawer of a bill of exchange, who has no effects in the hands of the drawee. It is true, that it would be expedient, on the part of the assured, to give notice and abandon, under any circumstances of loss; because then, if any portion of the property insured was saved from the general wreck, he would have a complete right to an indemnity; which he would not have, should a part of the property be saved, and he has neglected that precaution. The omission, however, is at the peril of the assured; and the risks to which the omission exposes him, will always be a sufficient guard against fraud. Every prudent man will give the notice: no designing man will neglect it, lest it should frustrate his purpose. Those who omit it will, therefore, generally, be of that description of men, from whom little is to be feared; and the omission will be the mere effect of inadvertence or ignorance. But, although prudence recommends the practice, the law does not enjoin it. If, indeed, it is made essential, that notice, which was intended only for a shield against the assured, will be converted into a sword, in the hands of the underwriter; and a court of justice must condemn the owner of a vessel and cargo to sustain the loss, against which he meant to secure himself, merely for omitting a form, which, if complied with, could not have produced the slightest advantage to the underwriter. The penalty is surely disproportioned to the transgression.

On the first trial, The Court, in the charge to the jury, expressed a wish that the plaintiff had given earlier notice of the loss to the underwriters; as it would have rebutted every suspicion of unfair and collusive conduct. It was enough, however (the Chief Justice observed), that no fact of that kind had been proved, nor indeed, alleged; since fraud is never to be presumed. The defendant's counsel has urged, that before the assured can recover for a total loss, there must be an express and seasonable abandonment. But, by the word "abandonment," I understand, a yielding, ceding or giving up; and in general, it applies to cases where there has been a great loss, and the assured, resorting to the policy for an indemnity, surrenders whatever is left of the property insured to the underwriters. We cannot, however, conceive, that when there is nothing left to give up, there can be anything to abandon; and if there is nothing to abandon, it would be absurd, as well as useless, to insist upon a formal act of abandonment. Under all these circumstances of the case, therefore, we think, that the plaintiff is *entitled to recover *285] the principal sum insured, and interest, to commence at the expiration of three months after the demand for payment.

Verdict for the plaintiff. (a)

(a) The jury, after being out some time, returned to the bar, and declared they could not agree, on account of the lapse of time, and expressed a desire to examine Mr.

After the second trial, and argument on the special verdict, THE COURT seemed to be of opinion, "that the plaintiff could not recover; because, he had not made proof of the loss, according to the terms of the policy, three months previously to the commencement of the action." No opinion was then, however, expressed on the second objection made by the defendant's counsel; but THE COURT asked, whether he would waive the objection to the time of commencing the action, that the cause might be decided on its merit? And he refused to comply.

Cur. adv. vult.[1]

Kaighn (who had effected the insurance as agent), relative to the character and conduct of the plaintiff. It, thereupon, appeared, that the witness had not heard from the plaintiff from 1786 until 1792, when he desired that the policy might be given to Mr. Rose to be recovered; and that, some time before, in a conversation with the witness's partner, the plaintiff had said, as a reason for not applying to the underwriters, "that he must obtain the captain's protest and vouchers of the loss, before he could recover on the policy." It also appeared, that the plaintiff was a man of irreproachable character. The jury, having received this further satisfaction, soon delivered a verdict for the plaintiff.

[1] The defendant's counsel having refused to waive the objection, the court subsequently sustained it, and gave judgment in favor of the defendant. 3 Dall. 477.

HIGH COURT OF ERRORS AND APPEALS

OF PENNSYLVANIA.

JULY SESSION, 1792.

LAWSON, appellant, *v.* MORRISON *et al.*, appellees.

Revocation of will.

A will, revoked by the execution of a subsequent one, but not cancelled, is, in general, re-established by the cancellation of the subsequent will.

The fact of the execution of a second will, not found at the decease of the testator, and the contents of which are not shown, is not, *ipso facto*, the revocation of a former one; to have that effect, its existence must be shown, at the death of the testator, or that he cancelled the latter will, with an intent to die intestate.

APPEAL from a sentence of the register of wills, &c., and two justices of the common pleas for the county of Cumberland. The case had been argued in July 1789 (before the present organization of the judiciary department under the existing constitution), and afterwards in October 1792, by *Bradford* and *Ingersoll*, for the appellant, and by *Lewis*, for the appellees.

The facts on which the appeal arose were as follows: A written paper, purporting to be the will of Janet Morrison, dated the 19th of October 1775, was exhibited for probate to the register of wills, &c., on the 19th of October 1786. A *caveat* was entered by the appellant, against admitting it to be proved, alleging that the testatrix had made a later will, which expressly *revoked* the former will; and that the latter will had not been cancelled or destroyed, although it could not be found after her death. The will of October 1775, was however, established, by the sentence of the register's court; from which sentence, the present appeal was brought; and new evidence was given in this court.

On the record and evidence, it appeared, that Janet Morrison had a will written, before this of 1775, by Oliver Anderson, which former will was duly executed. The same scrivener wrote this will. He afterwards wrote another will, in 1777, and a fourth will, about the latter end of the year 1779. The testatrix destroyed the first will, when the will of 1775 was executed, and also that of 1777, when she executed the will of 1779. In the last will, the scrivener (who was a witness) *believes* there were words revoking all *287] former wills, and *that he had usually inserted such a clause in all the wills he wrote; and John Ray, a subscribing witness to the will of 1779, swears, that, when it was executed, the testatrix *declared* it to be her last will, and that she revoked all former wills. The legatees were generally

the same, in the wills of 1775 and 1779: but the legacies were larger in the last, on account of the then depreciated state of the paper bills of credit emitted by congress. The will of 1779 had been delivered to the testatrix, about ten days before her death, by a Mrs. Linn, whom she had sent for it, to Oliver Anderson, who then had both wills in his custody; but the will of 1779 had not been seen afterwards. James Lawson, the appellant, was the eldest son of James Lawson, an only brother of the testatrix, who had no sister; but her brother had two other sons, named Thomas and Francis, and no other descendants. The testatrix had induced her nephew, James, to come from Ireland to Pennsylvania, with his family, some years before her death, and about a week before that event, received them, with their effects, into her house, and a few days after she had obtained the will of 1779, from Oliver Anderson. For some weeks before her death, she expressed great kindness for the appellant, and frequently said, "all her estate must be his." But when the will of 1779 was executed, the one of 1775 was not cancelled; because the testatrix was then out of humor with the appellant, and she was afraid less the will of 1779 might get into his hands, or be lost; and in such case, she desired Oliver Anderson to produce the will of 1775, as he deposed.

Upon this statement, the question arose—whether the will of 1779 (whose contents did not appear, but from the deposition of Oliver Anderson), was a revocation of the will of 1775?

For the *appellant*, two propositions were stated, and the corresponding authorities cited: 1st. That the will of 1777 was a revocation of the will of 1775, in act, as well as intention, either of which is sufficient. Moore 177; 3 Mod. 260; Dyer 143; Off. of Ex. 20; Swinb. 15, 525; Cowp. 90; God. Or. Leg. 51, 54; Cro. Jac. 115; 1 Roll. Abr. 614; 2 Eq. Abr. 771. 2d. That the mere cancelling of a later will, much less the mislaying or loss of a later will, is not a revival of a former will: the cancelling may be done with a view to die intestate; and the mislaying may be accidental; and the will of 1777, being in writing, can only, by the act of assembly, be annulled by writing. 3 Atk. 799; Doug. 36; Cowp. 49; 1 P. Wms. 343, 345; 4 Burr. 2513; Lofft 465, 470; Pow. Dev. 534, 535; 1 Dall. Laws, 53, § 2, 6.

For the *appellees*, the case was considered in various points of view. 1st. Does the law of Pennsylvania permit the revocation of a will by parol, or must it be in writing? The act of assembly declares that it shall be in writing. 1 Dall. Laws, 55, § 2, 6. In England, it is true, a will might *have been altered by *parol;* but it must have been express, [*288 not intentional, in the present, and not in the future, tense. God. Or. Leg. 51, 54; Swinb. 531; Cro. Jac. 115. The evidence here is not positive; it is mere supposition, that the will of 1777 in express terms revoked all former wills. 2d. Is the act of making a subsequent will (even where its contents are unknown), sufficient, in itself, as a revocation of a former will? The authorities directly disaffirm the position, where the subsequent will does not alter the *whole* disposition of the estate; and if the same solemnities are necessary to *revoke*, which are required to *make* a will, there is not, in the present case, proof by two witnesses of the contents of the will of 1777. Besides, the paper called a subsequent will, does not

appear to be more than a codicil, as it is not proved that any executors were constituted; and both might, therefore, stand together. There is no proof that the latter will disposed of the personal estate differently, but only that it increased the legacies. Perk. 179; God. Orph. Leg. 53, 12–3; Cro. Eliz. 721; Pow. Dev. 538; Swinb. 532; Cro. Eliz. 721; Cro. Car. 23–4; 1 Show. 537, 534; Salk. 592; Show. P. C. 149; Hard. 375; Cowp. 87–8; 3 Wil. 497; s. c. 2 W. Bl. 937. 3d. Does the destruction of the later, revive the former will? The intention of the party is undoubtedly material upon this question. The testatrix sent for the will; but whether she cancelled it, with a view to die intestate, or James Lawson destroyed it, with a view to claim the whole estate as heir-at-law, can only be explained by the circumstances; and there is one circumstance that is strong indeed, to show that she never meant to give to him the whole; namely, that James Lawson had arrived in Cumberland county, before the making of the latest will, and yet she therein bequeathed to other persons, legacies to a considerable amount. The cancelling of a later will, under circumstances less forcible, has been deemed the revival of a former one. 4 Burr. 2512. 4th. Is there any difference between the revocation of a will, in Pennsylvania, and in England, since the statute of frauds and perjuries? The doctrine in the act of assembly (1 Dall. Laws, 640) is the same as the doctrine in the statute 29 *Car. II.*, *c.* 3, and the effect should be equally uniform.

For the *appellant*, in reply.—All the cases cited by the opposite counsel, relate to *real* estate in England, subsequent to the statute of frauds and perjuries. But our position is, that a subsequent will or testament does, of itself, revoke all prior wills of *personal* estate. A later *testament*, says Swinb. 15, always infringes a former one; but a *codicil* is different; and the distinction between a testament and will is established in Cowp. 90. The present will was not found (nor was any other will found) in the *possession of the testatrix; and the presumption, therefore, is, that she cancelled the will of 1777, with an intention to die intestate. *289]

Chew, President, delivered his opinion, in general terms, in affirmance of the sentence of the register's court.

McKean, Chief Justice.—There has been no case or precedent cited, which comes up to this, in all its parts; but there are several cases, which depended upon the same principle.

Before the statute of 29 *Car. II.*, *c.* 3, wills, in England, might be revoked by any express words, without writing; and so it was in Pennsylvania, until altered by positive law; but in England, since that statute, and in Pennsylvania, since the act of assembly of the 4th of Anne, "concerning the probates of written and nuncupative wills, and for confirming devises of lands," wills of *lands* must be revoked by writing, accompanied with solemnities similar to those necessary for making the wills. Here, later wills of lands, or a writing, revoking a former will, must be proved by two or more credible witnesses; and no *testament*, or will in writing, for *personal* estate, can be revoked by *words*, except the same be committed to writing and read to the testator, and allowed by him, and proved by two witnesses at least. Besides these actual revocations, there are other acts of the testator, which have always been considered as revocations, because contrary to, or incon-

sistent with, the will, and evidencing an alteration of intention; as a deed in fee; or a lease for years to the same devisee, to commence after the testator's death; a subsequent marriage and birth of a child; cancelling, obliterating or destroying the will, and such like. These are termed, "implied, constructive, or legal revocations," and still subsist as they were before the act of assembly, or the statute of frauds. Cro. Jac. 49; Carth. 81. But all presumptive revocations may be encountered by evidence, and rebutted by other circumstances. Cowp. 53; Doug. 37.

It has been often determined, that a will, revoked by a subsequent will, but not cancelled, was re-established by the cancellation of the subsequent will. 1 Show. 537; Show. P. C. 1461; 1 Wils. 345; 2 Vern. 741; s. c. Prec. Chan. 459; s. c. 4 Burr. 2512; Cowp. 86, 92; Doug. 40; 2 W. Black. 937; 3 Mod. 204; Salk. 592.

There are, however, some particular circumstances, in this case, besides the general question. It appears, that the appellant had lived in the neighborhood of the testatrix, when she made the will of 1779; that the legatees in that will were chiefly the same as in the present, but some legacies were larger, on account of the money being then depreciated, and that Oliver Anderson was expressly requested by the testatrix to take care of the will of 1775, left the last *should get into the hands of the appellant, or be lost. On the other hand, it does not appear what became of the [*290 will of 1779, after it was sent and delivered to the testatrix, whether it was destroyed by her, or any other person—but it cannot be found. It does not appear, wherein the will of 1779 differed from the present one, nor what alteration was thereby made in particular, only that there were partial alterations, and there were no executors named in it.

In this view of the case, I am of opinion, that the mere circumstance of making the will of 1779, is not *virtually* a revocation of the former, the contents being unknown, and it not appearing to have been *in esse* at her death, but rather the contrary, and that she had cancelled or destroyed it. No other person was interested in its destruction, from anything I can discover, except the appellant or his brothers, who were not in America; and charity will induce a presumption, that she herself destroyed it. If this is the fact, the first will is not thereby revoked, as neither could be complete wills, until the death of the testatrix, and her destroying it had the same effect as if it never existed, unless it had been clearly proved, that she did it with an intention to die intestate. Should a contrary opinion hold, to wit, that the first will was revoked, at the instant the second was executed, yet the cancelling of the second by the testatrix herself, is a revival of the first, if undestroyed. *Harwood* v. *Goodright*, Cowp. 92.

Here is a good *subsisting* will properly attested: There is no way to defeat it, but by proving it was revoked by another will, *subsisting* at the death of the testatrix, or that she cancelled the later will, so revoking all former ones, with a mind to die intestate. And as the appellant has failed in such proof, I concur with the president, that the will of 1775 must stand; and that the sentence of the register's court be affirmed, with double costs.

THE COURT concurring, the sentence of the register's court was, accordingly, affirmed, with double costs.(*a*)

(*a*) See Boudinot *et al.*, Executors, *v.* Bradford, *ante*, p. 266.

*AUGUST SESSION, 1791.

HANNUM *et al.*, Plaintiffs in error, *v.* SPEAR, Defendant in error.

Lien of decedents' debts.—Sale under power.

The lien of a decedent's debts is not discharged, by a sale under a power, for the payment of legacies.

Spear *v.* Hannum, 1 Yeates 380, reversed.

THIS was a writ of error from the supreme court, founded on a bill of exceptions, taken at *nisi prius*, in Chester county, on a trial before MCKEAN, Chief Justice, and Justice YEATES.

The question arose on the will of Elizabeth Ring, who had given power to her executors to sell lands, for payment of legacies; and on the argument two points were made: 1st. Whether the power to sell, given by the will, was, in fact, for the payment of debts, or of legacies? And 2d. Whether by the laws of Pennsylvania, the creditors of the testatrix had such a lien on her lands, as could not be defeated by the sale, which the executors had made, by virtue of the power in the will?

The counsel for the plaintiff in error (*Lewis, E. Tilghman, McKean* and *Ross*) cited the following authorities: 1 Dall. Laws, app. 26, ch. 51; Ibid. p. 28, ch. 109; Ibid. p. 29, ch. 189; Ibid. p. 32; Penn. Laws, Weiss's Edit. p. 6, pl. 109; Ibid. p. 9, pl. 14; Ibid. p. 10, pl. 4; 1 Dall. Laws, app. 43, 47; 3 Ibid. 521.

The counsel for the defendant in error (*Ingersoll* and *Wilcocks*) cited the following authorities: Bac. Law Tr. 93; 2 Bl. Com. 378; 2 Woodes. 348; Cowp. 90; 21 Vin. 505, pl. 1; 3 & 4 Wm. & Mary, c. 14 (*a*); 2 Ves. 590; Ambl. 188; Gilb. Ch. 330; 2 Ves. 587; Prec. in Ch. 397; Cha. Ca. 249; 1 Dall. Laws, 12, 67; Ibid. in App. p. 45, § 8; 1 Dall. 481; Lov. on Wills, 190, 213.

THE COURT delivered their opinion, *seriatim*, to the following effect.

CHEW, President.—The question turns upon the power to sell lands, contained in the will of Elizabeth Ring. If the *power had been to sell *292] for the payment of debts, I should incline to the opinion, that the purchaser held the lands discharged from the debts. It has been the constant usage (and usage is the best interpreter of the laws), to give, by will, the power to sell lands, for the payment of debts. The titles of purchasers under such powers, have never heretofore been called in question; and they ought not now to be undermined. But in the present instance, the power was only given by the testatrix to sell the lands, for the payment of legacies: the executor, in selling them for the payment of debts, has assumed a power, which is not given by the will; and if they were sold, with a view to the payment of legacies, the purchaser has no defence against creditors. I am,

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(*a*) But *Ingersoll* observed, that the statute of *W. & M.*, *c.* 14, did not extend to Pennsylvania; and neither the court, nor the opposite counsel, contradicted the assertion.

therefore, of opinion, that the judgment of the supreme court ought to be reversed.

SHIPPEN, Justice.—Two questions arise in this cause: 1st. How far the lands of the deceased person are bound for his debts? And 2d. How far a testator may, by his will, affect the right which his creditors have in his lands?

1st. Lands were made subject to the payment of debts, by agreement between the proprietors, and the first adventurers for settling Pennsylvania, before they left England. This agreement was confirmed by a compact in 1682; and by a subsequent act of the legislature, lands were subjected to sale, for debts, on judgment and execution, in suits against executors. It is obvious, that the legislature intended to give creditors as good a security, with regard to the lands, as to the chattels, of their debtors. The execution issues against the executors; and by virtue of the writ, the lands of the testator, in the hands of an heir or devisee, may be levied on. In the last act for regulating defects (3 Dall. Laws, 523), a strong intimation is given of the sense of the legislature, that the lands are bound for the payment of debts, from the death of the debtor. This point seems, now, therefore, to be fairly at rest.

2d. There can be no satisfactory reason, why a testator should not have the power to order a sale of lands for the payment of his debts, provided the exercise of it does not militate with the general principle of the lien, which the law has given to creditors. This, however, is not the case before the court; for, the power given to the executors was to sell for the payment of legacies. Every purchaser is bound to know the law. An executor, with a power to sell, stands on the same footing as any other trustee, and must pursue the terms of his trust. The proceeds of the land, when disposed of, under a power to sell for the payment of legacies, cannot be considered as assets in the hands of the executor; so that if the sale were valid against creditors, they would be deprived of the security, which *the policy, and positive provision, of our law, meant to give them. It appears, therefore, to me, that the judgment of the supreme court must be reversed. [*293

SMITH, Justice.—I do not feel myself at liberty to join in the decision of the general question, as I have acted in the character of an executor, in a manner that may be affected by it. But I strongly incline to the opinion of the president, that a sale by an executor, under a power to sell for the payment of debts, is valid; and the purchaser will hold the lands discharged from the general lien in favor of creditors. The present case, however, is not of that description; for the will only gives a power to sell for the payment of legacies; and such a sale must be void as to the creditors.

BIDDLE, President of the Philadelphia Common Pleas.—I have no doubt in this case. A sale by executors, under a power to sell for the payment of legacies, is not valid against creditors. If the power had been to sell for the payment of debts, a *bonâ fide* sale would, in my opinion, be good against creditors, and all the world.

BY THE COURT.—Let the judgment of the supreme court be reversed.

CASES DETERMINED

IN THE

UNITED STATES CIRCUIT COURT

FOR THE

PENNSYLVANIA DISTRICT.

APRIL TERM, 1792.

Present—Wilson, Blair and Peters, Justices.

Collet *v.* Collet.

Naturalization.

The several states have a concurrent authority with the United States to naturalize aliens; but such authority cannot be exercised, so as to contravene the laws established by congress.

Thus, an individual state cannot exclude citizens naturalized by the authority of the general government; but she may adopt citizens upon easier terms than those which congress may impose.

This was a bill in equity, which stated the complainant to be a subject of his Britannic majesty, and the respondent to be a citizen of Pennsylvania. The respondent, in his plea, averred, that the complainant was a citizen of Pennsylvania; and this plea, if true, deprived the court of its jurisdiction, as the federal courts cannot (unless in some particularly specified cases) take cognisance of controversies between citizens of the same state. The question was argued, on the 21st of April, by *Randolph* and *Sergeant*, in support of the bill, and by *M. Levy*, in support of the exception to the jurisdiction. It then appeared, that the complainant was born in the Isle of Man, part of the British dominions; but it was certified, by the mayor of Philadelphia, that on the 30th of April 1790, he had taken the oath of allegiance to the state of Pennsylvania, agreeable to an act of the general assembly, passed the 13th of March 1789 (2 Dall. Laws 677), founded on the 42d section of the old constitution (1 Ibid., App. 60). It was likewise shown by a certificate from the collector of the customs of the port of Philadelphia, that on the 5th of November 1790, he was commander of the Pigou, an American ship; and the 6th section of the act of congress, for registering and clearing vessels (chap. 11, passed 1st September 1789) provides, that no

registry shall be made of any American ship, until it is sworn (among other things) that the "present master is a citizen of the United States."

*295] *In support of the plea, it was contended, that the power given to the United States, was meant as a guard against the narrow regulations that might, at any future period, be adopted by the individual states, to check the admission of aliens; and not as a security against the too easy extension of the rights of citizenship. This object would, therefore, be most effectually attained, by leaving the authority of the individual states unimpaired; and as there is nothing exclusive in the nature of the power, so neither is there anything exclusive in the manner of vesting it in the federal government. Though "Congress shall have power to establish a uniform rule of naturalization," Art. I., § 8, it does not necessarily follow, that each state of the confederacy may not, likewise, exercise the power of adopting aliens, upon its own terms. That an opinion prevails here, in favor of the state jurisdiction, must be inferred from the various laws which Pennsylvania, even subsequently to the naturalization act of congress (passed 26th of March 1790), has enacted, respecting the right that aliens may enjoy within her territory. 3 Dall. Laws 9, 183, 653. Nor is there any force in the argument, that the jurisdiction in maritime and admiralty cases is exclusively vested in the federal government, without the use of exclusive words; for those in their nature are exclusive, belong appropriately to the national character and arise extra-territorially of any state; whereas, naturalization is merely a municipal and domestic concern.

In opposition to the plea, it was urged, that contemplating the present situation of the United States, the birth of the complainant had made him an alien; and that, in order to change the condition of alienage into that of citizenship, the interposition of a competent constitutional and legislative authority was indispensable. This authority, throughout the United States, resides in the federal government alone; for the power of naturalization (which is given by the 8th section of the 1st article of the constitution) does of itself import exclusion. That one member of the Union should be able to disturb all the rest, by the introduction of obnoxious characters, was an evil to be prevented, and no effectual mode could be adopted to obviate the inconveniences of different systems and regulations in different states, short of giving to congress the exclusive power of establishing a uniform rule of naturalization. Exclusive words were not necessary in this case, any more than in the case of admiralty and maritime jurisdiction, which is, nevertheless, allowed to be exclusively vested in the general government, without the use of such words. If, therefore, congress had the exclusive power to admit citizens, that power being exercised by the act of the 26th March 1790, the naturalization, under the act of the legislature of Pennsylvania, was a mere nullity, and the complainant remains a subject of the British crown.

*296] *By the Court.—The question now agitated, depends upon another question; whether the state of Pennsylvania, since the 26th of March 1790 (when the act of congress was passed), has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the constitution of the United States, the authority to naturalize is exclusive or concurrent? We are of opinion,

then, that the states, individually, still enjoy a concurrent authority upon this subject; but that their individual authority cannot be exercised, so as to contravene the rule established by the authority of the Union. The objection founded on the word *uniform*, and the arguments *ab inconvenienti*, have been carried too far. It is, likewise, declared by the constitution (Art. I., § 8), that all duties, imposts and excises shall be *uniform* throughout the United States; and yet, if express words of exclusion had not been inserted as in a subsequent part of the same article (§ 10), the individual states would still, undoubtedly, have been at liberty, without the consent of congress, to lay and collect duties and imposts. Again, when it is said, that one state ought not to be privileged to admit obnoxious citizens, to the injury of another, it should be recollected, that the state which communicates the infection, must herself be first infected; and in this, as in other cases, we may be assured, that the principle of self-preservation will inculcate every reasonable precaution.

The true reason for investing congress with the power of naturalization has been assigned at the bar. It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual states cannot exclude those citizens, who have been adopted by the United States; but they can adopt citizens upon easier terms, than those which congress may deem it expedient to impose.

But the act of congress itself, furnishes a strong proof that the power of naturalization is concurrent. In the concluding proviso, it is declared, "that no person heretofore proscribed by any state, shall be admitted a citizen aforesaid, except by an act of the legislature of the state, in which such person was proscribed." Here, we find, that congress has not only circumscribed the exercise of its own authority, but has recognised the authority of a state legislature, in one case, to admit a citizen of the United States; which could not be done in any case, if the power of naturalization, either by its own nature, or by the manner of its being vested in the federal government, was an exclusive power.[1]

Upon the whole, the Court think that the plea to the jurisdiction has been maintained; and, therefore,

The bill must be dismissed. (*a*)

(*a*) It is remarkable, that the argument in this case, turned entirely upon the point whether the federal power of naturalization was exclusive or concurrent; and nothing was said by either side respecting the existence and operation of the act of Pennsylvania, which, as it depended in form and spirit on the old constitution, was virtually repealed when that constitution was abolished. The ideas of the reporter on that subject, are contained in a note upon the naturalization laws of Pennsylvania, in his edition of the acts of the general assembly (vol. 1, p. 7 a). It may be proper to add, that there has since been a decision before Judge Biddle, in the common pleas of Philadelphia county, where the existence of the Pennsylvania law was the gist of the controversy:

[1] Overruled in Chirac v. Chirac, 2 Wheat. 259, 269, where it was determined, that the power of naturalization is exclusively in congress. The grant of such power to congress is incompatible with its exercise by the state governments. Golden v. Prince, 3 W. C. C. 313. s. p. Lynch v. Clark, 1 Sandf. Ch. 583. Since the adoption of the constitution, no state can, by any subsequent law, make a foreigner a citizen of the United States, nor entitle him to the rights and privileges secured to citizens by that instrument. Dred Scott v. Sandford, 19 How. 393; Anon. 21 Law Rep. 630.

*APRIL TERM, 1793.

Present, WILSON, IREDELL and PETERS, Justices.

UNITED STATES v. RAVARA.

Jurisdiction.—Consuls.—Privilege.

The circuit courts have concurrent jurisdiction with the supreme court, in cases affecting foreign consuls.[2]

A consul is not privileged from a criminal prosecution, for an offence against the laws of the country in which he resides.

The offence of sending threatening letters, *held* to be indictable in a circuit court.

THE defendant, a consul from Genoa, was indicted for a misdemeanor, in sending anonymous and threatening letters to Mr. Hammond, the British minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money.

Before the defendant pleaded, his counsel (*Heatly*, *Lewis* and *Dallas*) moved to quash the indictment, contending that to the supreme court of the United States belonged the exclusive cognisance of the case, on account of the defendant's official character. By the 2d section of the 3d article of the constitution, it is expressly declared, that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." By declaring in the sequel of the same section, "that in all the other cases before mentioned the supreme court shall have *appellate* jurisdiction," the word *original* is rendered tantamount to *exclusive*, in the specified cases. But surely, an original jurisdiction established by the constitution in the supreme court, cannot be vested by law in any inferior courts. The 13th section of the judicial act provides, that "the supreme court shall have, exclusively, all such *298] jurisdiction of suits or proceedings *against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise, consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice-consul shall be a party." This provision obviously respects civil suits; but the 11th section declares, that "the circuit court shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognisable therein." This is a criminal prosecution, not otherwise provided for; and if the jurisdiction can be *exclusively* vested in the circuit court, it destroys the *original* jurisdiction given by the constitution to the

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And in that case, as well as the case of the United States v. Villato (*post*, p. 370), the act of assembly was adjudged to be obsolete.[1]

[1] And see the remarks of Chief Justice TANEY, in the License Cases, 5 How. 585.

[2] St. Luke's Hospital v. Barclay, 3 Bl. C. C. 259; Graham v. Stucken, 4 Id. 50; Lorway v. Lousada, 1 Low. Dec. 77; Gittings v. Crawford, Taney, Dec. 1.

supreme court. In justice to the legislature, therefore, such a construction must be rejected; and the cognisance of the case be left, upon a constitutional footing, exclusively to the supreme court. The argument is the more cogent, from a consideration of the respect which is due to consuls, by the law of nations. Vatt. lib. 2, c. 2, § 34.

Rawle, the District-Attorney, stated in reply, that there was a material distinction between public ministers and consuls; the former being entitled to high diplomatic privilege, which the latter, by the law of nations, had no right to claim; and he contended, that the supreme court has original, but not exclusive, jurisdiction of offences committed by consuls: that the district court had jurisdiction (exclusively of the state courts) of all offences committed by consuls, except where the punishment to be inflicted exceeded thirty stripes, a fine of one hundred dollars, or the term of five months imprisonment: and that the circuit court had, in this respect, a concurrent jurisdiction with the supreme court as well as the district court. If, indeed, this is a crime "cognisable under the authority of the United States," it is within the express delegation of jurisdiction to the circuit court.

WILSON, Justice.—I am of opinion, that although the constitution vests in the supreme court, an *original* jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting a *concurrent* jurisdiction, in such inferior courts, as might by law be established: and as the legislature has expressly declared, that the circuit court shall have "exclusive cognisance of all crimes and offences, cognisable under the authority of the United States," I think, the indictment ought to be sustained.

IREDELL, Justice.—I do not concur in this opinion, because it appears to me, that, for obvious reasons of public policy, the *constitution intended to vest an exclusive jurisdiction in the supreme court, upon [*299 all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the constitution seems fairly to justify the interpretation, that the word *original*, means *exclusive*, jurisdiction.

PETERS, Justice.—As I agree in the opinion expressed by Judge WILSON, for the reasons which he has assigned, it is unnecessary to enter into any detail.

The motion for quashing the indictment was accordingly rejected, and the defendant pleaded *not guilty;* but his trial was postponed, by consent, until the next term.(*a*)

(*a*) The defendant was tried in April session 1794, before JAY, Chief Justice, and PETERS, Justice; and was defended by the same advocates, on the following points: 1st. That the matter charged in the indictment was not a crime by the common law, nor is it made such by any positive law of the United States. In England, it was once treason; it is now felony; but in both instances, it was the effect of positive law. It can only, therefore, be considered as a bare menace of bodily hurt; and, without a consequent inconvenience, it is no injury, public or private. 4 Bl. Com. 5; 8 *Hen. VI.*, *c.* 6 § 9; *Geo. I.*, *c.* 22; 4 Bl. Com. 144; 3 Id. 120. 2d. That considering the official character of the defendant, such a proceeding ought not to be sustained, nor such a punishment inflicted. The law of nations is a part of the law of the United States; and the

*Livingston *et al.* v. Swanwick.

Witness.—Pleading.—Variance.

A broker is a competent witness, to prove his own authority to make the agreement upon which the suit is brought, notwithstanding his commission may depend upon the establishment of the contract.

In an action on a contract, made by a broker on behalf of the defendant, for the delivery of stock, a variance between the declaration and the written agreement is not material; the actual contract being proved as laid, of which the writing is merely corroborative.

This was an action on the case, to recover the difference upon a stock contract, which Samuel Anderson, as the broker and agent of the defendant, who resided in Philadelphia, had entered into with the plaintiffs, who resided in New York, in the following terms:—

"I do hereby engage to deliver to John R. Livingston, Esq., the engagement of John Swanwick, Esq., of Philadelphia, to deliver to J. R. Livingston, Esq., aforesaid, one hundred shares of the bank stock of the United States, on the 5th January next ensuing, upon receiving from the said John R. Livingston, payment for the same, at the rate of twenty-one shillings and six pence in the pound.

New York, 15th July 1791. Samuel Anderson."

I. On the trial of the cause, the plaintiffs produced a correspondence between Anderson and the defendant, in relation to the contract, after it was made, and then offered Anderson himself as a witness, to prove that he had received a verbal authority to make the contract for the defendant; that he had accordingly executed the instrument above set forth; and that there had been a punctual compliance with the stipulations, on the part of the plaintiffs.

The defendant objected, that Anderson was not a competent witness to prove his own authority; and that he was interested in the question, as he

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law of nations seems to require, that a consul should be independent of the ordinary criminal justice of the place where he resides. Vatt. lib. 2, c. 2, § 84. 3d. But that, exclusive of the legal exceptions, the prosecution had not been maintained in point of evidence; for it was all circumstantial and presumptive, and that too, in so slight a degree, as ought not to weigh with a jury on so important an issue. 2 Hale H. P. C. 289; 4 Smol. Hist. Eng. p. 382 in note.

Rawle, in reply, insisted, that the offence was indictable at common law; that the consular character of the defendant gave jurisdiction to the circuit court, and did not entitle him to an exemption from prosecution, agreeable to the law of nations; and that the proof was as strong as the nature of the case allowed, or the rules of evidence required. In support of this argument, he cited the following authorities. 4 Bl. Com. 142, 144; 1 Lev. 146; 1 Keb. 809; 4 Bl. Com. 180; Str. 193–4; Bl. Com. 242; Crown Circ. 376; Fost. 128; Leach, 204; 1 Dall. 338; 1 Sid. 168; Comb. 304; Leach, 39; Ld. Raym. 1461; 1 Dall. 45.

The Court were of opinion, in the charge, that the offence was indictable, and that the defendant was not privileged from prosecution, in virtue of his consular appointment.

The jury, after a short consultation, pronounced the defendant, guilty; but he was afterwards pardoned, on condition (as I have heard) that he surrendered his commission and *exequatur*.

As to the question of jurisdiction, see United States v. Worrall, *post*, p. 384.

had an action actually depending for his commissions on making the contract. But—

By the Court.—The witness is competent to prove every part of the transaction. He is not interested in the event of the suit; nor can the verdict, in this case, be given in evidence, upon the trial of the action for his commissions. Anderson was a known, established broker; and unless he was admitted to give evidence of the instructions he received (which were *oral* in this case, and are usually so, in similar cases), it would be impracticable to ascertain the facts, that are essential to enable the court to decide upon the merits of the controversy.

The witness was, thereupon, admitted.

II. To the action and declaration (which contained five counts), the following exceptions were taken, in the course of the defence.

*1st. That the action is brought in the names of Brockholst and J. R. Livingston, whereas, the contract in writing is made with J. R. Livingston only. [*301

2d. That the first count states an agreement by Swanwick to transfer stock at a certain day: but the evidence is only of an agreement to deliver an engagement for that purpose.

3d. That the second and fourth counts state an agreement by Swanwick, to deliver an engagement to transfer stock to J. R. Livingston, or order: but the evidence does not prove that he engaged to transfer stock to the plaintiff's order.

4th. That the third count states a contract being made by Anderson, as the authorised agent of Swanwick, that Swanwick should transfer stock to the plaintiff: but the evidence only shows a contract by Anderson, that there should be delivered to the plaintiff an engagement of Swanwick to transfer the stock.

5th. That the fifth count states the plaintiff's attendance at the place of transfer; but there is no proof of the fact.

But the exceptions were considered and overruled, in the charge to the jury, of which, in that respect, the following is the substance.

By the Court.—The objection to the form of the action ought not to prevail. The contract is proved by the testimony of Anderson; and the written paper is merely corroborative. At the time, then, of forming the contract, it was perfectly understood by the parties transacting the business, that Brockholst and J. R. Livingston were jointly concerned; and, if the action had not been instituted in their joint names, it might have been pleaded in abatement.

Nor is the objection to the variance between the declaration and the written contract, on account of the words "or order," being stated in the former, though not contained in the latter, material in point of law. It was unnecessary to set forth the written contract at all, in the declaration; and it is only now offered as additional evidence, to prove the parol bargain between the parties. In the case of a bond, bill of exchange, or promissory note, there would be more weight in the objection; because they are, exclusively, the evidence of the respective contracts to which they give existence,

character and operation; but the written paper, in the present instance, is of no more force, than any other testimony of its contents would be. The words in the declaration must, therefore, be considered as surplusage, and do not affect the material parts of the charge.

As to the other variances between the contract as laid, and the written contract produced, the same principles will apply. And the non-attendance *302] of the plaintiffs at the place of transfer, *is sufficiently excused by the waiver, which has been proved on the part of the defendant.

Verdict for the plaintiffs, for $19,400.

Lewis, *Rawle*, *Randolph* and *Dallas* for the plaintiffs. *E. Tilghman*, *Ingersoll*, *Wilcocks* and *Sergeant*, for the defendant.(*a*)

APRIL TERM, 1794.

Present, WILSON and PETERS, Justices.

BRUDENELL *et al.* v. VAUX *et al.*

Computation of time.

A statute requiring mortgage to be recorded within six months, held, to mean calendar, not lunar months.

THE question in this cause arose upon the act of assembly for recording mortgages (1 Dall. Laws, 112), the mortgage of the defendants having been recorded after the expiration of six lunar, but within six calendar, months, from the date: And THE COURT, having compared this with other acts of the legislature, were of opinion, that by the word "months," calendar months were intended.[1]

Lewis and *Tilghman*, for the plaintiff. *Ingersoll*, *Rawle* and *Thomas*, for the defendant.

(*a*) The defendant's counsel tendered a bill of exceptions to the admission of Anderson's testimony; and, also, to the opinion of the court on the points stated in the charge. A writ of error was, accordingly, brought; but never prosecuted.

[1] Commonwealth *v.* Chambre, 4 Dall. 143; Moore *v.* Houston, 3 S. & R. 159; Snyder *v.* Warren, 2 Cow. 518; Parsons *v.* Chamberlin, 4 Wend. 512; People *v.* New York, 10 Id. 393; Leffingwell *v.* White, 1 Johns. Cas. 99; Sheets *v.* Selden, 2 Wall. 177.

ARMSTRONG *v.* CARSON'S executors.

Action on judgment of another state.—Assessment of damages.

The plea of *nil debet* is inadmissible, in an action on the judgment of a court of another state; no plea can be received that would be bad in the courts of the state in which the original judgment was obtained.

The court will not assess the damages; it must be done by writ of inquiry.

A JUDGMENT having been obtained in the supreme court of the state of New Jersey, an action of debt was brought upon it here; and the defendants pleaded *nil debent.*

But *Bradford* contended, that, consistently with the federal constitution Art. IV., § 15, and the act of congress of 26th May 1790 (1 U. S. Stat. 122), the plea was inadmissible. The constitution declares that "full faith and credit shall be given, in *each state, to the public acts, records and judicial proceedings of every other state:" and the act provides, that [*303 those records and judicial proceedings, being authenticated in the mode prescribed, "shall have such faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are, or shall be, taken." It is a general principle, that a debt cannot be denied, without denying the instrument on which it is founded: and the only question left open, by the act of congress, is —whether the courts of New Jersey would sustain any other plea than *nul tiel record,* if the present action had been brought there.

Ingersoll declined arguing the point for the defendant, thinking it clearly against him.

WILSON, Justice.—There can be no difficulty in this case. If the plea would be bad, in the courts of New Jersey, it is bad here: for whatever doubts there might be on the words of the constitution, the act of congress effectually removes them; declaring in direct terms, that the record shall have the same effect in this court, as in the court from which it was taken. In the courts of New Jersey, no such plea would be sustained; and therefore, it would be inadmissible in any court sitting in Pennsylvania.[1]

Bradford then proposed settling the interest, but WILSON, Justice, observed, that he had had more than one occasion to object to the court's interposing, in any form, to assess damages. In some states, he said, it had, indeed, grown into a practice; and the courts had in that, and, perhaps, in many other instances, done the business which ought to go to a jury. *Lewis* referred to a case in the supreme court of the United States, in which this point had been made, though not directly decided; but the judge said, it was not the foundation of the judgment of the court; and that, in his opinion, a writ of inquiry was the regular mode of procedure.(*a*)

It being suggested, however, that the usage in the state courts was to enter the judgment generally; and that the plaintiff must ascertain the

(*a*) But see Brown *v.* Van Braam, in the supreme court of the United States. (3 Dall. 344.)

[1] Mills *v.* Duryee, 7 Cr. 481; Hampton *v.* McConnell, 3 Wheat. 234; Warren Manufacturing Co. *v.* Ætna Ins. Co., 2 Paine 502; Westervelt *v.* Lewis, 2 McLean 511.

debt, and issue execution at his own peril; that mode was adopted on the present occasion.[1]

Judgment for the plaintiff.

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*304] *APRIL TERM, 1795.

Present, PATERSON and PETERS, Justices.

VANHORNE'S Lessee *v.* DORRANCE.

Erasure in deed.—Indian title.—Constitutional law.—Construction of statutes.—Condition.

An erasure, addition, interlineation, or other alteration, will render void a deed, if done after its execution.

It is the province of the jury to determine, whether such alteration was made after delivery.

In Pennsylvania, the proprietaries had, by their charter, the exclusive right of pre-emption to all lands within the province; a grant from the Indians to any other person, conferred no title.

The constitution is paramount to the power of the legislature; and every statute repugnant to it, is absolutely void.

The judiciary is a co-ordinate branch of the government, and may declare a statute to be void, as repugnant to the constitution.

An act of a state legislature, divesting one person of his property, and vesting it in another, at a fixed compensation, is unconstitutional and void.

A statute shall never have an equitable construction, in order to overthrow or divest an estate.

Every statute, derogatory to the rights of property, or that takes away the rights of a citizen, is to be construed strictly.

Conditions precedent are such as must happen, or be performed, before an estate can vest, or be discharged; they must be strictly, literally and punctually performed.

When a condition copulative precedes an estate, the whole must be performed, before the estate can arise; so, when an act is previous to any estate, and consists of several particulars, every one of them must be performed, before the estate can vest.

THIS was a cause of great expectation, involving several important questions of constitutional law, in relation to the territorial controversy between the states of Pennsylvania and Connecticut. After a trial, which continued for fifteen days, the presiding judge delivered the following charge to the jury, comprising a full review of all the important facts and principles that had occurred during the discussion.[2]

PATERSON, Justice.—Having arrived at the last stage of this long and interesting cause, it now becomes the duty of the court to sum up the evidence, and to declare the law arising upon it. A mass of testimony has been brought forward in the course of the trial, the greater part of which is altogether immaterial, and can be of no use in forming a decision. The great points on which the cause turns, are of a legal nature; they are questions of law; and therefore, for the sake of the parties, as well as for my own sake, they ought to be put in a train for ultimate adjudication by the supreme court. In the administration of justice, it is a consolatory idea,

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[1] If the action be brought for a sum certain, or which may be rendered certain by computation, the court may assess the damages, without a writ of inquiry. Reimer *v* Marshall, 1 Wheat. 215; McLain *v.* Rutherford, Hemp. 47.

[2] For a history of a Connecticut title in Pennsylvania, and a settlement under it, see Barney *v.* Sutton, 2 Watts 31.

that no opinion of a single judge can be final and decisive; but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified. For the sake of clearness, I shall consider, 1st. The title of the plaintiff: 2d. The title of the defendant.

1. *The Title of the Plaintiff.*—In deducing the title, the plaintiff exhibited:

1. The charter or grant from Charles II. to William Penn. The lands in question lie within the limits of this charter.

2. Nov. 5, 1768. A deed from the Six Nations to Thomas and Richard Penn. To this deed, a map is annexed, and made part of it, by which the land conveyed is accurately delineated or laid down. This mode of procedure is eminently just and laudable; it furnishes a precedent, which, so far as possible, ought to be observed in *every transfer of land made by the Indians, as it obviously tends to quiet the spirit of jealousy, to [*305 remove suspicion, and prevent imposition and fraud.

3. Oct. 29, 1768. A warrant to survey for the proprietors, certain tracts of land containing twenty thousand acres.

4. Dec. 8 & 9, 1768. Survey of the above lands. The land in controversy lies within the Indian deed to the Penns, and is covered by this survey.

5. March 1, 1769. Lease from Thomas and Richard Penn to Thomas Van Horne, for the term of seven years, of lot No. 38, containing one hundred acres.

6. Instructions to lay out and sell the land.

7. Feb. & March, 1771. Allotment to Thomas Van Horne of lot No. 20, containing 190 acres and 90 perches.

8. January 15, 1772. Warrant from Richard Penn, lieutenant-governor, to make a separate return of lot No. 20, to Thomas Van Horne. A separate return was made accordingly, and marked on the general survey of March 1771.

9. January 17, 1772. Patent from Thomas and John Penn to Thomas Van Horne for lot No. 20. The consideration-money was paid agreeable to contract.

10. Nov. 15, 1774. Deed from Thomas Van Horne to Cornelius Van Horne, lessor of the plaintiff, for lot No. 20.

It is in evidence, that this lot was built upon, fenced, tilled and improved by Van Horne. It is also in evidence, that John Dorrance, the defendant, is in possession of, and resides upon, the said lot.

Such is the title upon which the plaintiff rests his cause. It is clearly deduced and legally correct; and therefore, unless sufficient appears on the part of the defendant, will entitle the plaintiff to your verdict. To repel the plaintiff's right, and to establish his own, the defendant sets up a title: 1st. Under Connecticut: 2d. Under the Indians: 3d. Under Pennsylvania.

I. Under *Connecticut.* The title under Connecticut is of no avail, because the land in controversy is ex-territorial; it does not lie within the charter-bounds of Connecticut, but within the charter-bounds of Pennsylvania. The charter of Connecticut does not cover or spread over the lands in question: of course, no title can be derived from Connecticut. Here then the defendant fails.

II. Under the *Indians*. The Indian deed, under which the defendant claims, bears date the 11th of July 1754. It has been observed, that this *306] *deed is radically defective and faulty; that fraud is apparent on the face of it; and, particularly, that the specification or description of the land is written on a razure. Of this, gentlemen, you will judge, as the deed will be given to you for inspection. Permit me to observe, that there are several ways, by which a deed may be voided or rendered of no effect. One of these is by razure, addition, interlining or other alteration, in any material part, if done after its execution. It is the province of the jury to determine, whether any such alteration was made, after the delivery of the deed. Besides, this deed appears to have been executed at different times; and not in that open, public, national manner, in which the Indians sell and transfer their lands.

But if the deed was fairly obtained; if it has legal existence, then what is its legal operation? By the charter of William Penn, the right of pre-emption attached, and was vested in him, to all the lands comprehended within its limits. The Penn family had, exclusively, the right of purchasing the lands of the Indians; and, indeed, the Indians entered into a stipulation of that kind.

Again, this deed is invalid by the laws of Pennsylvania. The legislature of Pennsylvania, by an act passed the 7th February 1705, declare, "That if any person presume to buy any land of the natives, within the limits of this province and territories, without leave from the proprietary thereof, every such bargain or purchase shall be void and of no effect." (1 Dall. Laws, 5.) By an act passed the 14th February 1729–30, it is further declared, "That every gift, grant, bargain, sale, written or verbal contract or agreement, and every pretended conveyance, lease, demise, and every other assurance made, or that shall hereafter be made, with any of the Indian natives, for any lands, &c., within the limits of this province, without the order or direction of the proprietary, or his commissioners, shall be null, void and of no effect." (1 Dall. Laws, 248.)

The land in controversy, being within the limits of Pennsylvania, the Connecticut settlers were, in legal estimation, trespassers and intruders. They purchased the land without leave, and entered upon it without right. They purchased and entered upon the land without the consent of the legislature of Connecticut. True it is, that the legislature of Connecticut gave a subsequent approbation, but this was posterior to the deed executed by the Six Nations to Penn, at Fort Stanwix, and the principle of relation does not retrospect so as to affect third persons. The consequence is, that the Connecticut settlers derive no title under the Indian deed.

*307] *III. The title which the defendant sets up under *Pennsylvania*. This is the keystone of the defendant's title, as one of his counsel very properly expressed it. It required no great sagacity to perceive, that the defendant's hope of success was founded on a law of Pennsylvania, commonly called "the quieting and confirming act." This act, and the two subsequent ones of a suspending and a repealing nature, open an extensive and important field for discussion. In general verdicts, it frequently becomes necessary for juries to decide upon the law as well as the facts. To form a correct judgment, legal principles must be taken up and applied, and when

this is done in a proper manner, it gives stability to judicial decisions, and security to civil rights. Hence uniformity and certainty; hence the decisions of to-morrow will be like the decisions of to-day; they will run in the same line, because they are founded on the same principles. To aid you, gentlemen, in forming a verdict, I shall consider:

I. The constitutionality of the confirming act; or, in other words, whether the legislature had authority to make that act?

Legislation is the exercise of sovereign authority. High and important powers are necessarily vested in the legislative body; whose acts, under some forms of government, are irresistible and subject to no control. In England, from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is transcendent and has no bounds. "The power and jurisdiction of Parliament," says Sir Edward Coke, "is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, *si antiquitatem spectes, est vetussissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.* It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of *Henry VIII.* and *William III.* It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king *Henry VIII.* and his three children.[1] It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in *short, do everything that is not naturally impossible; and therefore, some have not scrupled to call its power, by a figure rather too bold, [*308 the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo." (1 Bl. Com. 160.)

From this passage, it is evident, that, in England, the authority of the parliament runs without limits, and rises above control. It is difficult to say, what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the parliament: it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. Some of the judges in England have had the boldness to assert, that an act of parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an act of parliament cannot be drawn into question by the judicial department: it cannot be disputed, and must be obeyed. The power of parliament is absolute and transcendent; it is omni-

[1] But it cannot make that to be the true religion, which is a false one in fact. What is the true religion, can only be declared by God. Parliament may punish the practice of the true religion, but it cannot affect its obligation in conscience.

potent in the scale of political existence. Besides, in England, there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America, the case is widely different: every state in the Union has its constitution reduced to written exactitude and precision.

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they owe their existence to the constitution: they derive their powers from the constitution: it is their commission; and therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature, in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the case in other countries, yet, in this, there can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void.

*309] *In the second article of the declaration of rights, which was made part of the late constitution of Pennsylvania, it is declared: "That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought, or of right can be, compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be, vested in, or assumed, by any power whatever, that shall, in any case, interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." (Dec. of Rights, Art. II.)

In the thirty-second section of the same constitution, it is ordained; "that all elections, whether by the people or in general assembly, shall be by ballot, free and voluntary." (Const. Penn. § 32.)

Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points, there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an act declaring, that, in future, there should be no trial by jury, would it have been obligatory? No: it would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by jury is a fundamental law, made sacred by the constitution, and cannot be legislated away. The constitution of a state is stable and permanent, not to be

worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government.

*Having made these preliminary observations, we shall proceed to contemplate the quieting and confirming act, and to bring its validity [*310 to the test of the constitution. In the course of argument, the counsel on both sides relied upon certain parts of the late bill of rights and constitution of Pennsylvania, which I shall now read, and then refer to them occasionally in the sequel of the charge. (The judge then read the 1st, 8th and 11th articles of the declaration of rights; and the 9th and 46th sections of the constitution of Pennsylvania. (See 1 Dall. Laws, app. p. 55–6, 60.)

From these passages, it is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man could become a member of a community, in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance, in every free government; and lastly, it is contrary both to the letter and spirit of the constitution.[1] In

[1] A federal court has no authority to declare a state law void, because it conflicts with the state constitution. Hunt v. Lamphire, 3 Pet. 280; Satterlee v. Matthewson, 2 Id. 414; Wat

short, it is what every one would think unreasonable and unjust in his own case.

The next step in the line of progression is, whether the legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation? That the legislature, on certain emergencies, had authority to exercise this high power, has been urged from the *311] *nature of the social compact, and from the words of the constitution, which says, that the house of representatives shall have all other powers necessary for the legislature of a free state or commonwealth; but they shall have no power to add to, alter, abolish or infringe on any part of this constitution. The course of reasoning, on the part of the defendant, may be comprised in a few words. The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case, it cannot be lodged anywhere with so much safety as with the legislature. The presumption is, that they will not call it into exercise, except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles and renders it an holy thing.

We must, gentlemen, bear constantly in mind, that the present is a case of landed property; vested by law in one set of citizens, attempted to be divested, for the purpose of vesting the same property in another set of citizens. It cannot be assimilated to the case of personal property taken or used in time of war or famine, or other extreme necessity; it cannot be assimilated to the temporary possession of land itself, on a pressing public emergency, or the spur of the occasion. In the latter case, there is no change of property, no divestment of right; the title remains, and the proprietor, though out of possession for a while, is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it: then the right of necessity is satisfied and at an end; it does not affect the title, is temporary in its nature, and cannot exist for ever. The constitution expressly declares, that the right of acquiring, possessing and protecting property is natural, inherent, and inalienable. It is a right not *ex gratiâ* from the legislature, but *ex debito* from the constitution. It is sacred; for it is

son v. Mercer, 8 Id. 88; and see Gilchrist v. Little Rock, 1 Dill. 261; Ranlett v. Leavenworth, Id. 263. It cannot inquire into its policy, wisdom or justice. Bennett v. Boggs, Bald. 60. A state law which divests a vested right, is not repugnant to the constitution of the United States, unless it impair the obligation of a contract. Satterlee v. Matthewson, 2 Pet. 380.

[1] The right to take private property for public use, is incident to all governments; but the obligation to make compensation, is concomitant. Bonaparte v. Camden and Amboy Railroad Co., Bald. 205; Baring v. Erdman, 14 Haz. Pa. Reg. 120. But the legislature cannot take one man's property, and vest it in another. Palairet's Appeal, 67 Penn. St. 479; and see Ervine's Appeal, 16 Id. 256; Kneass's Appeal, 31 Id. 87; Saxton v. Mitchell, 78 Id. 479.

further declared, that the legislature shall have no power to add to, alter, abolish or infringe any part of the constitution. The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no farther. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous; one encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution *eventually destroyed. Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another? The rights of private property are regulated, protected and governed by general, known and established laws; and decided upon by general, known and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence, security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer, to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous and enormous a power as that which has been exercised on the present occasion; a power that, according to the full extent of the argument, is boundless and omnipotent: for the legislature judged of the necessity of the case, and also of the nature and value of the equivalent. [*312

Such a case of necessity, and judging, too, of the compensation, can never occur in any nation. Singular, indeed, and untoward must be the state of things, that would induce the legislature, supposing they had the power, to divest one individual of his landed estate, merely for the purpose of vesting it in another, even upon full indemnification; unless that indemnification be ascertained in the manner which I shall mention hereafter.

But admitting, that the legislature can take the real estate of A. and give it to B., on making compensation, the principle and reasoning upon it go no further than to show, that the legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the constitution, be extended beyond the point of judging upon every existing case of necessity. The legislature declare and enact, that such are the public exigencies, or necessities of the state, as to authorize them to take the land of A. and give it to B.; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the constitution, direct, and they accordingly declare and ordain, that A. shall receive compensation for the land. But here the legislature must stop; they have run the full length of their authority, and can go no further: they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the legislature should, of themselves, without the participation of the proprietor, or intervention of a jury, assess *the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways. 1. By the parties [*313

—that is, by stipulation between the legislature and proprietor of the land. 2. By commissioners mutually elected by the parties. 3. By the intervention of a jury.

The compensatory part of the act lies in the ninth section. "And whereas, the late proprietaries, and divers other persons, have heretofore acquired titles to parcels of the land aforesaid, agreeably to the laws and usages of Pennsylvania, and who will be deprived thereof by the operation of this act, and as justice requires that compensation be made for the lands, of which they shall be thus divested; and as the state is possessed of other lands, in which an equivalent may be rendered to the claimants under Pennsylvania, and as it will be necessary, that their claims should be ascertained by a proper examination: Be it, therefore, enacted by the authority aforesaid, that all persons having such claims to lands, which will be affected by the operation of this act, shall be, and they are hereby required, by themselves, guardians, or other lawful agents, within twelve months from the passing of this act, to present the same to the board of property, therein clearly describing those lands, and stating the grounds of their claims, and also adducing the proper proofs, not only of their titles, but of the situations, qualities and values of the land so claimed, to enable the board to judge of the validity of their claims, and of the quantities of vacant lands proper to be granted as equivalents. And for every claim which shall be admitted by said board, as duly supported, the equivalent by them allowed, may be taken either in the old or new purchase, at the option of the claimant; and warrants and patents, and all other acts of the public offices relating thereto, shall be performed free of expense. The said board shall also allow such a quantity of vacant land, to be added to such equivalent, as shall, in their judgment, be equal to the expenses, which must necessarily be incurred in locating and surveying the same. And that the board of property may in every case, obtain satisfactory evidence of the quality and value of the land, which shall be claimed as aforesaid, under the proprietary title, they may require the commissioners aforesaid, during their sitting in the county of Luzerne, to make the necessary inquiries, by the oaths or affirmations of lawful witnesses, to ascertain those points; and it shall be the duty of the said commissioners to inquire and report accordingly." (Act of 28th March 1787, § 9. P. L. 274.)

*314] In this section, two things are worthy of consideration. *1. The mode or manner, in which compensation for the lands is to be ascertained. 2. The nature of the compensation itself.

The Pennsylvania claimants are directed to present their claims to the board of property—and what is the board to do thereupon? Why, it is—1. To judge of the validity of their claims. 2. To ascertain, by the aid and through the medium of commissioners, appointed by the legislature, the quality and value of the land. 3. To judge of the quantity of vacant land to be granted as an equivalent.

This is not the constitutional line of procedure. I have already observed, that there are but three modes, in which matters of this kind can be concluded, consistently with the principles and spirit of the constitution, and social alliance. The first of which is by the parties, that is to say, by the

legislature and proprietor of the land. Of this the British history presents an illustrious example in the case of the Isle of Man.

"The distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws and smugglers), authority was given to the treasury, by statute 12 *Geo. I.*, *c.* 28, to purchase the interest of the then proprietors, for the use of the crown; which purchase was at length completed in the year 1765, and confirmed by statutes 5 *Geo. III.*, *c.* 26 and 38, whereby the whole island and all its dependencies, so granted as aforesaid (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of bishoprics, and other ecclesiastical benefices) are inalienably vested in the crown, and subjected to the regulations of the British excise and customs." 1 Bl. Com. 107.

Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where the parliament is omnipotent, and can mould the constitution at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited; where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable. The case of the Isle of Man was a fair and honorable stipulation; it partook of the spirit and essence of a contract; it was free and mutual; and was treating with the proprietors on equal terms.

But if the business cannot be effected in this way, then the value of the land, intended to be taken, should be ascertained by commissioners, or persons mutually elected by the parties, *or by the intervention of the judiciary, of which a jury is a component part. In the first case, we [*315 approximate nearly to a contract; because the will of the party, whose property is to be affected, is in some degree exercised; he has a choice; his own act co-operates with that of the legislature. In the other case, there is the intervention of a court of law, or, in other words, a jury is to pass between the public and the individual, who, after hearing the proofs and allegations of the parties, will, by their verdict, fix the value of the property, or the sum to be paid for it. The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury.[1] The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. By the confirming act, the value of the land taken, and the value of the land to be paid in recompense, are to be ascertained by the board of property. And who are the persons that constitute this board? Men appointed by one of the parties, by the legislature only. The person whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away. The board of property thus constituted, are

[1] The constitution of Pennsylvania of 1874, secures to the owners of land, taken for public use, the right of trial by jury. Art. xvi. § 8.

authorised to decide upon the value of the land to be taken, and upon the value of the land to be given by way of equivalent, without the participation of the party, or the intervention of a jury.

2. The nature of the compensation. By the act, the equivalent is to be in land. No just compensation can be made, except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalise the act, and make it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.

To close this part of the discourse: It is contended, that the legislature must judge of the necessity of interposing their despotic authority; it is a right of necessity, upon which no other *power in government can de- *316] cide: that no civil institution is perfect; and that cases will occur in which private property must yield to urgent calls of public utility or general danger. Be it so. But then it must be upon complete indemnification to the individual. Agreed, but who shall judge of this? Did there also exist a state necessity, that the legislature, or persons solely appointed by them, must admeasure the compensation, or value of the lands seized and taken, and the validity of the title thereto? Did a third state necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth state necessity exist, that the value of this land-equivalent must be adjusted by the board of property, without the consent of the party, or the interference of a jury? Alas! how necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property, without his consent, without a hearing, without notice, the value of that property judged upon, without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the constitution, I ask, wherein it differs from the mandate of an Asiatic prince? Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of, for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of courts, of constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made.[1]

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[1] Of this decision, Judge Huston says, in Satterlee v. Matthewson, 16 S. & R. 173: "It is not easy to determine whether the misapprehension of the facts in the cause, or the misapplication of the law to those facts, is most conspicuous." It led to the immediate passing of the intrusion act of the 11th April 1795 P. L. 703.

II. But, admitting the confirming act to be constitutional and valid, the next subject of inquiry is, what is its operation, or, in other words, what construction ought to be put upon it.

It is contended, on the part of the defendant, that on the passing of the act the estate was divested from the Pennsylvania claimants, and instantly vested in the Connecticut settlers. To decide upon this question, it will not be amiss to lay down a rule or two of exposition, applicable to the act under consideration. A statute shall never have an equitable construction in order to overthrow or divest an estate. Every statute, derogatory to the rights of property, or that takes away the estate of a citizen, ought to be construed strictly.

*Let us test this act by the foregoing rules. The act is entitled, "An act, for ascertaining and confirming to certain persons, called Connecticut claimants, the lands by them claimed within the county of Luzerne, and for other purposes therein mentioned," and was passed the 28th of March 1787. The first five sections, being material in the discussion of this part of the subject, run in the following words: (Here the judge read the law.) The act requires, that the Connecticut settlers shall prefer their claims to the commissioners; that they shall support their claims by reasonable proof: that the commissioners shall adjudicate upon or confirm the claims; that they shall have the lots, to which claims are set up and admitted, surveyed; that they shall make return of their surveys and their book of entries to the supreme executive council, who shall cause patents to be issued for their confirmation, and each patent shall comprehend all the parcels of land which are to be confirmed to the same claimant, to whom, by the return of the commissioners, the same shall be found to belong. [*317

The mere offering or presenting of the claim is not sufficient. It must be supported by reasonable proof, and ascertained and established by the commissioners. These acts must be performed before the estate passes out of the Pennsylvania claimants, and is vested in the Connecticut settlers. They are antecedent acts, and in nature of a condition precedent. Now, conditions precedent are such as must happen or be performed, before the estate can vest or be enlarged; they admit of no latitude; they must be strictly, literally and punctually performed. It is a known maxim, that where the estate is to arise upon a condition precedent, it cannot vest until that condition is performed; and this has been so strongly adhered to, that even where the condition has become impossible, no estate or interest grew thereupon. Where a condition copulative precedes an estate, the whole must be performed, before the estate can arise; or where an act is previous to any estate, and that act consists of several particulars, every particular must be performed before the estate can vest or take effect. Co. Litt. 206, 218; 1 Atk. 374, 376; Com. Rep. 732.

The estate of the Pennsylvania claimants was not divested on the passing of the act; it was not divested on presenting the claim on the part of the Connecticut settlers. Other acts were previously necessary, and in particular, the commissioners must pass upon and confirm the claim, before the estate is divested from the one party and vested in the other. These things precede, *and must be done, before any estate can vest in the defendant; but they have not been done, and therefore, the estate remains in the plaintiff. This construction corresponds with the meaning and spirit, the tendency [*318

and scope of the act itself. The intent of the legislature was, to vest in Connecticut claimants of a particular description, a perfect estate to certain lands in the county of Luzerne; but then it was upon condition; it was to operate upon, secure and sanctify such claims only as should be admitted and ascertained, approved and established by the commissioners. This is further evident, from the powers and functions of the commissioners, who were to inquire, examine, hear proofs, &c., respecting the claims—and for what purpose? Why, that they might admit and approve of such as were supported by satisfactory evidence, and make return thereof to the executive council, who should thereupon cause patents to be issued for their confirmation. Until the commissioners had decided in favor of a claim, it remained *in statu quo;* the act did not cover and protect it. Further, if the act will admit of two constructions, that one certainly ought to be adopted which is in favor of the legal owner, and which will not divest his estate, until the terms specified in the act shall have been fully complied with. When the legislature undertake to give away what is not their own, when they attempt to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to transfer it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness, and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of private property.

Besides, it was the manifest intention of the makers of the act, that a just compensation should be made in land, to the Pennsylvania claimants; upon this principle, the act proceeds; and therefore, if it appear, that such compensation cannot be made, or that it is very dubious, whether it can be effected, the court ought not to give such a construction, as will deprive the owner of his estate, with little or no prospect of being recompensed in value. If either party ought to be driven to the necessity of controverting the question with the state of Pennsylvania, it ought to be the Connecticut settlers, who have no legal title to the land, and not the Pennsylvania claimants, in whom is vested a good estate at law.

Deeming the construction which has been put upon the act, to be the sound one, it precludes the inquiry, how far a patent of confirmation was necessary to substantiate the claim of the *defendant, so as to render it available in a court of common law. *319]

III. The nature and operation of the suspending act. This act was passed the 29th of March, 1788, and is as follows. (Here the judge read the act at large.)

This act was passed before the adoption of the constitution of the United States, and therefore, is not affected by it. If the legislature had authority to make the confirming act, they had also authority to suspend it. Their constitutional power reached to both, or to neither. By the act of the 28th of March 1787, the commissioners were to ascertain and confirm the claims of the Connecticut settlers, upon the doing whereof the estate, if the law was constitutional, would become vested in them. This has not been done; the claim in the present instance has not been ascertained and confirmed; and as this act suspends or revokes these ascertaining and confirming powers,

it never can be done. Of course, there is an end of the business. The parties are placed on their original ground; they are restored to their pristine situation.

IV. After the opinion delivered on the preceding questions, it is not necessary to determine upon the validity of the repealing law. But it being my intention in this charge to decide upon all the material points in the cause, in order that the whole may, at once, be carried before the supreme judicature for revision, I shall detain you, gentlemen, a few minutes only, while I just touch upon the constitutionality of the repealing act. This act was passed the 1st of April 1790: the repealing part is as follows: (Here the judge read the 1st and 2d sections of the act. See 2 Dall. Laws, 786).

This act was made after the adoption of the constitution of the United States, and the argument is, that it is contrary to it. 1. Because it is an *ex post facto* law. 2. Because it is a law impairing the obligation of a contract.

1. That it is an *ex post facto* law. But what is the fact? If making a law be a fact, within the words of the constitution, then no law, when once made, can ever be repealed. Some of the Connecticut settlers presented their claims to the commissioners, who received and entered them. These are facts. But are the facts of any avail? Did they give any right or vest any estate? No, whether done or not done, they leave the parties just where they were. They create no interest, affect no title, change no property; when done, they are useless and of no efficacy. Other acts were necessary to be performed, but before the performance of them, the law was *suspended and then repealed. [*320

2. It impairs the obligation of a contract, and is, therefore, void. If the property to the lands in question had been vested in the state of Pennsylvania, then the legislature would have had the liberty and right of disposing or granting them to whom they pleased, at any time, and in any manner. Over public property, they have a disposing and controlling power; over private property, they have none, except, perhaps, in certain cases, and those under restrictions, and except also, what may arise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents. But if the confirming act be a contract between the legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons, of their just rights; rights ascertained, protected and secured by the constitution and known laws of the land. The plaintiff's title to the land in question, is legally derived from Pennsylvania; how then, on the principles of contract, could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.

I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming act is unconstitutional and void. It was invalid, from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.

2. If the confirming act is constitutional, the conditions of it have not been performed; and therefore, the estate continues in the plaintiff.

3. The confirming act has been suspended. And—

4. Repealed.

The result is, that the plaintiff is, by law, entitled to recover the premises in question, and, of course, to your verdict.

Verdict for the plaintiff. (*a*)

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*321] * UNITED STATES *v.* GUINET *et al.*[1]

Neutrality.

The conversion of a merchant-vessel of a foreign belligerent power into a vessel of war, within a port of the United States, with intent to cruise against another belligerent power, at peace with this country, is to be deemed an original outfit; and is a breach of the neutrality laws of the United States.

THIS was an indictment against Etienne Guinet and John Baptist Le Maitre, for a misdemeanor, in fitting out and arming Les Jumeaux (The Twins), in the port of Philadelphia, to be employed in the service of the Republic of France, against Great Britain, both powers being at peace with the United States. The act on which the indictment was founded, contained the following sections:[2]

§ 3. "That if any person shall, within any of the ports, harbors, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace, or shall issue or deliver a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned, at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars, and the term of imprisonment shall not exceed three years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunitions and stores which may have been procured for the building and equipment thereof, shall be forfeited, one-half to the use of any person who shall give information of the offence, and the other half to the use of the United States."

§ 4. "That if any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting, the

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(*a*) Writ of error was brought on the judgment in this case, and is now depending in the supreme court.[3]

[1] 2. c. Whart. St. Trials 93.

[2] Act of 5th June 1794, 1 U. S. Stat. 381. This act remained in force until the passage of the act of 30th April 1818, by which all laws on the same subject were repealed. The Estrella, 4 Wheat. 298.

[3] As this case does not appear in the reports of cases in the supreme court, the writ, if ever issued, must have been abandoned, on the passing of the intrusion law. The case is frequently mentioned by judges, in opinions subsequently delivered, but no allusion is made to a writ of error.

force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, cruiser, or armed vessel in the service of a foreign prince or state, or belonging to the subjects or citizens of such prince or state, the same being at war with another foreign prince or state with whom the United States are at peace, by adding to the number or size of guns of such vessel *prepared for use, or by the addition thereto of any equipment solely applicable to war, every [*322 such person so offending shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so that such fine shall not exceed one thousand dollars, nor the term of imprisonment be more than one year."

The indictment was brought upon the 3d section. Guinet only was apprehended; and being arraigned, he pleaded not guilty.

The material facts that appeared in evidence, upon trial, were these: Les Jumeaux entered at the port of Philadelphia, in the month of ———, laden with sugar and coffee, from Port-au-Prince; and on her arrival, she mounted four guns and two swivels. The vessel, it seemed, had originally been a British cutter, employed in the trade to the coast of Guinea; and had ten port-holes on each side, though only four were actually open, at the time of her arrival, to accommodate the four guns then mounted. Soon after, a Frenchman applied to a ship-carpenter to repair the vessel, which was in a very rotten state; and, after some difficulty, a bargain for that purpose was struck; but the carpenter declared he would only open the number of ports (twenty) which were pierced when she came into port; and in all other respects, fit her for a merchant-ship. At the time of repairing her, she was owned in shares by Le Maitre, the original owner, and seven other Frenchmen. The twenty ports being opened, and other repairs of the vessel proceeding rapidly, the government instituted an inquiry into the subject, in order to ascertain the nature and design of her equipments. On examination, the master-warden found the vessel in great forwardness, her twenty ports open, her upper deck changed, &c., and four iron guns on carriages, with two swivels, were lying on the adjoining wharf. He, therefore, desired the carpenter to desist from working any further on the vessel, and made a report on the subject to the secretary of war; who directed, that all the recent equipments of a warlike nature should be dismantled, and the vessel restored to the state in which she was when she arrived. The master-warden, accordingly, caused the port-holes to be shut up, and even refused to allow any ring-bolts to be fixed in the vessel. A few days before she left the port, a witness said he saw four guns in her hatchway; the carpenter who repaired her said, she carried with her from the wharf, the four guns, and two swivels that she had brought in; and according to the custom-house entry, she sailed from the city in ballast, having nothing in her hold but provisions, water-casks, and wood for the ship's use. It had been said, at one time, that she was to carry flour; at another time, that *she was to [*323 carry passengers; and Guinet had told the ship-carpenter that she would be advertised on freight. She sailed in the middle of the day, and some of the workmen went down in her as far as League Island.

It appeared, likewise, that she came to, at Wilmington; that an apprentice to the pilot on board of her, was left behind, in order to carry on some guns, cordage and bedding; that accordingly, he, in company with his

master (who had returned from Wilmington, after piloting the vessel thither), two or three Frenchmen that belonged to the vessel, and two black boys, carried and delivered on board, three or four carriage guns; that the witness (who did not go on board) saw no appearance of other guns, which he could have done, though it was dark, had there been port-holes and the guns run out; that the pilot-boat returned to Philadelphia the same night, for the purpose of carrying to the ship some of her crew, and two or three hogsheads; that the hogsheads were put on board the pilot-boat the next day, and being there opened were found to be filled with a number of little kegs, the contents of which were unknown; that at the same time, twenty or thirty muskets, a number of lanterns, cans, &c., were put on board; that the whole of this transaction took place in the night-time, between ten and eleven o'clock; and that, during the same night, the pilot-boat, with three or four Frenchmen on board, pushed from the wharf, and sailed down to Wilmington, where the vessel still lay; that the things brought in the pilot-boat being put on board the ship, she got under weigh and proceeded to Reedy Island; that there were then between thirty and forty persons on board; that the witness could not perceive that she had any guns or gun-carriages on deck, though this might be owing to its being dark; that the vessel dropped down to New Castle; and the pilot-boat was again sent to Philadelphia, by order of an officer (as it would seem) belonged to the vessel, who met the witness there, and between nine and ten o'clock at night, put one or two trunks and a large box on board the pilot-boat, at South street wharf; that there were then lying on the wharf six guns, without carriages, which Guinet told the witness he must take on board the pilot-boat, at twelve o'clock at night; that the masts were so weak, that the witness was at first afraid to undertake it; that he went, however, to borrow a runner and tackle from an adjoining sloop; that Guinet concluded to postpone heaving the guns into the boat until the next evening; and in the intermediate time, the marshal seized the guns and boat, and apprehended the parties.

This was the amount of the general evidence relating to the equipment of the vessel, and the evidence particularly pointed against the defendant, Guinet, was to the following effect:—While the vessel was repairing, Guinet *324] was seen frequently attending *the people at work; and the master-warden, before whom he had attended with the owner, understood that he acted in the character of an interpreter, as the owner could not speak English. The ship-carpenter did not see Guinet, until the bargain was struck, and the repairs were considerably advanced; that afterwards, when the owner came, which was generally twice a day, he spoke so little English, that Guinet used to translate for him, and on all occasions act as his interpreter; that Guinet sometimes brought orders from the owner to the carpenter; that he never assumed any right of ownership himself, but, on the contrary, once complained to the carpenter, that the owners had not given him so much as a hat for interpreting. In opposition, however, to the idea of his being merely an interpreter, it was proved, that when the marshal seized the pilot-boat, Guinet claimed one of the trunks on board, and declared, that the guns lying on the wharf belonged to him, he having, as he alleged, purchased them, to sell again as merchandise. A runner and tackle was sent on board, while the pilot-boat was in the marshal's custody, but it had never been claimed. Guinet denied, before the judge, on his examination, that he

knew anything more of the pilot-boat, than that she was going to New Castle, and he had put his baggage on board to send thither; but the pilot's apprentice being confronted with him, insisted that he was the person who had ordered the six cannon to be taken on board, and that he was acquainted with the transaction. When, likewise, Guinet was apprehended, two papers were found in his possession: one of them was an account, stated in his own handwriting, between Le Maitre and himself, in which were charges for supplying muskets, ball and cannon; for moneys advanced at sundry times on account of the equipments; and for commissions and attendance in superintending the repairs and outfit of the vessel. The other paper was a letter from Messrs. Mendenhall & Co., of Wilmington, to Guinet, dated the 20th of December 1794, containing the following passage: "Your favor per post is come to hand. We think it not possible to get any 4lb. shot, or any other size here. We think it probable, that we can let one of our boats go down with the things for the ship; they have taken the water-casks on board already. The account shall be ready against you call." The deputy-collector proved the manifest of the sloop Farmer, which brought up six guns, consigned from Mendenhall & Co. to Guinet; and Guinet acknowledged before the judge, that the guns lying at South street wharf were those that had been so consigned to him.

Levy, for the defendant.—This is the first prosecution that has occurred since an act of congress was passed on the subject. Before the act was passed, an important and interesting controversy *had arisen between [*325 the executive of the federal government and the French minister; in the course of which the latter contended, that, if not by the general law of nations, at least, by positive compact, the French republic was entitled to repair and equip vessels of war in the ports of the United States; since the treaty, by making it expressly unlawful for the others, had, by necessary implication, made it lawful for her. Treaty, Art. 22. As a branch of this controversy, it had, likewise, been insisted, that an American citizen had a right to enter into the service of the French republic, and the position certainly received some countenance, from the refusal of a grand jury in Boston to find bills of indictment against persons who had acted in that manner, and from the acquittal of Gideon Henfield by a Philadelphia jury.[1] These interpretations and proceedings were, however, disapproved by our executive; who, on the first point, contrary to the avowed sense of the great mass of the people, construed the 22d article of the treaty, to be merely an exclusion of other belligerent nations from the privilege of equipping in our ports, and not a permission to France; and this diversity of sentiment between the government and the citizens, finally produced the act of congress now in question.

The section on which this prosecution is founded is, indeed, a severe and penal one; but in proportion to the rigor of the punishment, will a conscientious jury require the degree of proof to be. It contemplates four descriptions of offence: 1st. To fit out and arm, or attempt to fit out and arm: 2d. To procure to be fitted out and armed: 3d. To be concerned, knowingly, in furnishing, fitting out, or arming any ship or vessel, with intent

[1] See Henfield's Trial for illegally enlisting in a French privateer. Whart. St. Trials, 49.

that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon a nation at peace with the United States: and 4th. To issue or deliver a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be so employed. Two facts, then, are essential to justify a conviction. 1st. The vessel must have been fitted out and armed within the port of Philadelphia: and 2d. The defendant must, at least, have been knowingly concerned in her equipment.

1st. With respect to the first fact, there is no direct proof that the vessel sailed with more guns than she brought with her; and the mere intention to arm and equip her, is not criminal. Nor even if cannon, arms and ammunition had been put on board, does it follow, as a necessary consequence, that it was intended to arm her as a vessel of war, in the service of France, to cruise against the friends of America. There is no evidence of such cruising; nor of the design (whether as passengers or mariners) with which the thirty or forty persons were on board the vessel; and military stores *326] may lawfully be sold here, or be exported to foreign countries *by American citizens: the act is only punishable, when the armament and stores are applied to the use of the vessel in which they are shipped. But the most that can possibly be inferred from the evidence, is an *augmentation* of the force of the vessel, as she arrived here, with guns actually mounted; and then the indictment should have been founded on the 4th, instead of the 3d section of the act. There is a great difference in the language and penalties of the two sections, which undoubtedly arose from the very different nature of the cases to which they respectively apply. For, it is neither so offensive in itself, nor so dangerous to the peace of the nation, that a vessel, already armed, should add something to its force, as that a vessel should originally be constructed and equipped within our ports, for the purposes of war. Hence, therefore, the bare attempt in the latter case is made criminal; but in the former, the unlawful act must be consummated. The words of the 4th section refer to ships of war, cruisers or other armed vessels: all the writers on the subject state that there are four kinds of armed vessels, three with commissions, and one without commission, to wit, vessels of war, privateers, letters of marque, and all other armed vessels; and this vessel must be included in the last description, not being embraced by the others.

2d. With respect to the second essential fact, there is not sufficient evidence to show, that the defendant was knowingly concerned in the illegal outfit of the vessel. He acted only as an interpreter; which, notwithstanding the generality of the word, "concerned," cannot fairly be included in the definition of an offence, that calls for proof of a serious intention to furnish and outfit the vessel. There was no crime in being owner of the guns at South street wharf; and the object in ordering them to be put on board the pilot-boat, does not appear. The transaction with Mendenhall & Co. rather proves that the guns were not intended for this vessel, as it would have been easier, more expeditious and safer, in that case, to send them on board from Wilmington, with the water-casks, and other articles which were actually sent by them. The account found in the defendant's possession relates to the disbursements of a factor for his principal: It is not shown how it arose; whether before or after the articles were received; and

after a vessel illegally equipped has sailed, it cannot be an offence, within the act, to pay drafts in discharge of the tradesmen's bills. Presumptions unfavorable to innocence ought not to be encouraged, in cases so highly penal.

Rawle, the district-attorney, entered into a description of the principles and advantages of an honorable neutrality; and relied upon the good sense and patriotism of the jury, to prevent their being seduced by a retrospective view of the popular prejudices that had formerly prevailed. He then contended: 1st. *That the offence had been committed: 2d. That the defendant was knowingly concerned in committing it: And 3d. That the indictment was founded on the proper section of the act of congress. [*327

1st. There is evidence, that the vessel sailed from the wharf, with the guns that she brought into port; that four other guns, with military stores, were afterwards put on board of her, and that she had a crew of thirty or forty persons. It is arming a vessel, when arms are put on board, she being on her passage; and it cannot be material, that those arms should be arranged in a particular manner. As to the design of the equipment, there is no proof of an actual cruise; but the jury will decide, whether it was any other than that charged in the indictment. There is no attempt to prove that she had a cargo, or carried passengers; on the contrary, it is in evidence that she sailed in ballast; and the subdivisions of interest in the vessel are in the nature of all ownership of privateers.

2d. The defendant was knowingly concerned. As furnishing arms, knowing them to be designed for an unlawful purpose, constitutes the crime; and as an interpreter was the necessary instrument on the occasion; even if the defendant had appeared in no other character, this would have been sufficient to convict him. But he was not merely an interpreter—he appears to have interfered on various other occasions; and his account is conclusive evidence of a confidential and important agency in accomplishing the illegal outfit of the vessel. It might afford some color of defence, to say, that he only *attempted* to send the cannon on board from South street wharf, if this account did not demonstrate that he was concerned in the equipment from the beginning. There is nothing to justify an idea, that it arose from paying drafts, after the vessel had sailed; but on the contrary, several items are for money advanced; and the charge for commissions, &c., has relation to the very moment of commencing the repairs. The agency proved by the account, is corroborated by the purchase of cannon from Mendenhall & Co., which is evidently connected with the general plan for equipping this vessel.

3d. The indictment is well laid: the 3d section is the only one to which the case is applicable. The 4th section refers only to the augmentation of the force of the vessel, which, on her arrival in our ports, was, in fact, a vessel of war, either public or private. If, therefore, a man-of-war or privateer adds to the number or size of her guns, or makes any equipment solely applicable to war, it is an offence against this section. But if a vessel, having guns on board, and yet being neither a man-of-war, nor a privateer, enters our ports, she cannot legally be equipped for the purposes of war. Without this construction, *the act of congress would be nugatory; as it might be evaded, by bringing a single gun in the vessel. In the present [*328 case, it appears, that Les Jumeaux had been employed in the Guinea trade, that she arrived here, with a cargo of sugar and cotton; and being converted

from a merchant vessel, carrying a few guns for self-defence, into a privateer, armed for hostilities, it is clearly an original outfit, within the meaning of the law. The distinction is justified by this further consideration, that the 3d section makes arming the vessel, with intent to employ her in hostilities, the offence; whereas, the 4th section refers nothing to the intent with which the force of the vessel is augmented, as it only contemplates the case of vessels originally fitted for war by the nation to which they belong.

PATERSON, Justice.—This is an indictment against John Etienne Guinet, for being knowingly concerned in furnishing, fitting out and arming Les Jumeaux, in the port and river Delaware, with intent that she should be employed in the service of the French republic, to cruise, or commit hostilities upon the subjects of Great Britain, with whom the United States are at peace: and it is the province of the jury to inquire, whether the proof exhibited on the trial has fully maintained the charge contained in the indictment.

Much has been said upon the construction of the 3d and 4th sections of the act of congress; but the court is clearly of opinion, that the 3d section was meant to include all cases of vessels armed within our ports, by one of the belligerent powers, to act as cruisers against another belligerent power in peace with the United States. Converting a ship from her original destination, with intent to commit hostilities; or, in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit; for the act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceable use, to the warlike purpose, that constitutes the offence.

The vessel in question arrived in this port, with a cargo of coffee and sugar, from the West Indies; and so appears to have been employed by her owner with a view to merchandise, and not with a view to war. The inquiry therefore, is limited to this consideration, whether, after her arrival, she was fitted out, in order to cruise against any foreign nation, being at peace with the United States. It is true, she left the wharf with only four guns, the number that she had brought into the port; but it is equally true, that when she had dropped to some distance below, she took on board three or four guns more, a number of muskets, water-casks, &c.; and it is manifest, that other guns, were ready to be sent to her by the pilot-boat. These circumstances clearly prove a conversion from the original commercial design *329] of the vessel, to a design of cruising against *the enemies of France; and of course, against a nation at peace with the United States, since the United States are at peace with all the world. Nor can it be reasonably contended, that the articles thus put on board the vessel were articles of merchandise; for, if that had been the case, they would have been mentioned in her manifest, on clearing out of the port, whereas, it is expressly stated that she sailed in ballast. If they were not to be used for merchandise, the inference is inevitable, that they were to be used for war. No man would proclaim on the house-top, that he intended to fit out a privateer: the intention must be collected from all the circumstances of the transaction, which the jury will investigate, and on which they must decide. But if they are of opinion, that it was intended to convert this vessel from a merchant ship into a cruiser, every man who was knowingly concerned in doing so, is guilty in the contemplation of the law.[1]

[1] See United States v. Quincy, 6 Pet. 445; The Meteor, 1 Am. L. Rev. 401; United States

It will only, then, be necessary to ascertain, how far the defendant was knowingly concerned; for, though he were concerned, if he did not act with a knowledge of the real object, he would be innocent. It has been alleged in his defense, that he was merely an interpreter; and if, in fact, he had appeared in that character alone, we should not have thought it a sufficient ground for conviction. But the jury will collect from the other parts of the transaction, whether this is not used as a mask to cover his efficient agency in the equipment of the vessel. He carried orders from the owner to the ship-carpenter; he told the pilot-boy, at what time the guns should be taken on board his boat, to be carried to the ship; the account found in his possession states charges for supplies of cannon, ball, muskets, and commissions for services; and the whole is conducted in a secret and mysterious manner, under the shade of night. Would he have acted this part, as a mere interpreter? If it had been fair mercantile business, involving nothing repugnant to our laws, would it have been so much a work of darkness? This alone casts a gloom over the transaction, that will impress every just and ingenuous mind with an idea of fraud and delinquency.

If the defendant has been concerned in the offence, there is no doubt that it is effected, as far as it was in his power to complete it. The illegal outfit of the vessel was accomplished; and that an additional number of cannon was not sent to augment her force, was not owing to his respect to the laws, but to the vigilance of the public police.

Upon the whole, the jury will consider the indictment; and give such a verdict as shall comport with evidence and law.

Verdict, guilty.

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*Parasset v. Gautier. [*330

Bail.

Where a reasonable cause of action is shown, the court will not discharge on common bail. Thus, on a motion to discharge on common bail, the court will not inquire into a question of fraud in the original contract.

A defendant may be held to bail in a new action, notwithstanding a discharge on common bail, in a former action in a state court—the plaintiff having lost his appeal from the judge's order, through the neglect of his agent.[1]

A capias had issued in this suit, returnable to the present term; but previously to the return of the writ, there had been a hearing before Judge Peters, at his chambers, upon a citation to show cause why the defendant should not be discharged on common bail; the judge had ordered bail to be given; and the defendant had appealed from this order to the court. The merits of the appeal were now discussed; and independently of some circumstances relating to the origin of the debt, which the court said ought not to weigh upon a question of bail,(a) the material facts appeared to be these:

(a) Paterson, Justice.—If you make it a question of fraud in the original contract, or in the assignment, the court cannot inquire into it, upon a question of bail. We cannot travel into the merits of the controversy: it would be, in effect, a pre-adjudica-

v. Skinner, 2 Wheeler C. C. 232; Salderondo v. The Nostra Senora del Carmino, Bee 43.

[1] See Bingham v. Wilkins, Crabbe 50; Gardner v. Lindo, 1 Cr. C. C. 592.

An action had been instituted in the supreme court of Pennsylvania, between the same parties, for the same cause; and on a hearing before Chief Justice McKean, the defendant was ordered to be discharged on common bail. From that order, the plaintiff did not appeal; but afterwards applied by motion to the supreme court, for a rule upon the defendant to enter special bail. This the court refused; because they would not take cognisance of the subject, but by way of appeal from the decision of the chief justice; and the proper time for making such an appeal had elapsed. Under these circumstances, the plaintiff discontinued his action in the state court, and brought the present action here. It also appeared, that the plaintiff (who was a foreigner, ignorant of our laws) had not originally employed an attorney to appear before Chief Justice McKean, though the person that then attended him pretended to have a competent knowledge of legal proceedings.

M. Levy, for the plaintiff, contended that bail ought to be given. Nothing short of a judgment can be a perpetual bar in personal actions; and therefore, the certificate of a discharge on common bail by the Chief Justice of Pennsylvania, was not binding upon the judge of this court, who had given a different order. The person, character and legal talents of that judge could not be taken into view. The justices of the courts of common pleas possess a concurrent jurisdiction, without *possessing a spark *331] of his jurisprudential knowledge; and yet, if his discharge is conclusive, so likewise must theirs be.(*a*) Actions are often commenced after nonsuits; and it is clear, that the second court is not bound, in such cases, nor even in cases where a decision may have been had on the merits, by the opinion of a first court. It is true, that every species of vexation should be discountenanced; but every mistake ought not to be interpreted into an act of vexation. The plaintiff was ill advised in the mode of presenting his case to the Chief Justice of Pennsylvania; and, considering his ignorance of our laws, he ought not to lose the benefit of bail, by the *laches* of his agent, in not pursuing the technical form of an appeal. Nor is the discontinuance of the former action, under these circumstances, to be imputed to him as matter of malice and persecution. If the plaintiff's motive was originally just and commendable, to recover a *bonâ fide* debt, the allegation of any subsequent impropriety, must be manifested by some fact: now, if he was ever fairly entitled to hold the defendant to bail, the discharge can furnish no ground to accuse the plaintiff of vexation, for endeavoring, by various means, to accomplish that object; and after the state court had refused to interpose, he must either abandon that object, or discontinue his suit, and resort to another tribunal. A man may commence a suit, as often as he pleases; and may hold his debtor twenty different times to bail, if any reasonable cause can be assigned for so withdrawing and renewing the process of law. No argument to the contrary can be founded on 2 Wils. 381; for bail was there

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tion of the cause. The principle that must govern such preliminary investigations rests here; if a reasonable cause of action is shown, the defendant ought to be held to bail.

(*a*) Paterson, Justice.—The certificate of the Chief Justice of Pennsylvania is produced, as evidence of vexation on the part of the plaintiff; and not to bind the judgment of the court.

refused, on the second action, because it had not been asked in the first.[1] Vexation must flow from a worse source than ignorance or accident: it is generally instigated by malice; and always characterized by vigilance. In the present case, there is no symptom of malice; and the want of vigilance has alone produced the plaintiff's embarrassment.

Du Ponceau, for the defendant, admitted, that when a discontinuance took place, without any vexatious design or effect, either in consequence of a mistake in the nature of the action, or of an attorney's slip in the form of conducting it, bail might be ordered in the second action, for the same cause: but he contended, that when a question has been decided by one tribunal, another tribunal of co-ordinate jurisdiction will not take cognisance of it, except in the regular course of a judicial appeal. He urged, likewise, that the circumstances of instituting and discontinuing an action in the state court, were *primâ facie* evidence of vexation, that required a better explanation and excuse *than have been given; and to these he added, the [*332 change of the tribunal. But he particularly insisted, that the neglect of appealing from the order of Chief Justice McKean, was his own *laches*, which he ought not to be allowed to remedy, by transferring the suit to another court, at the expense of his antagonist. 2 Wils. 381.

Paterson, Justice.—The grounds of vexation in this case do not appear to me to be such as to justify the refusal of bail; and every case of this nature must be decided upon its own circumstances. I shall always, indeed, be a friend to the practice of holding to bail, wherever there is a probable cause of action. Here, the cause of action is apparent; and though it may be liable to a reasonable controversy, or may be refuted upon a trial, we ought not to investigate the merits, at this stage, further than to ascertain what probability there exists in support of the plaintiff's claim. The neglect to appeal from the order of the Chief Justice of Pennsylvania, which eventually occasioned the discontinuance of the first suit, appears, likewise, to be a mere slip of the attorney; and if we can, consistently with the law prevent the plaintiff's suffering, in consequence of that slip, I think we ought to do it.

Peters, Justice.—On the hearing before me, I perceived, that there had been a lapse in not bringing the first suit formally before the state court; and I was desirous of putting the question on the same footing here, as if an appeal had been regularly instituted there. I entertain a high respect for the opinions of the Chief Justice of Pennsylvania; and, on this occasion, I am disposed to think, that the plaintiff's inability to state his case, in the absence of his attorney, or the defect of proof, at the time, occasioned his issuing the order for discharging the defendant on common bail. But as the matter appears to this court, I perfectly concur in the sentiments which have been delivered by Judge Paterson.

The order to hold the defendant to bail, was, accordingly, affirmed.

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[1] In Bates v. Barry, 2 Wils. 381, the defendant was held to bail a second time, for the same cause of action, after the plaintiff had discontinued the first writ, by reason of a mistake.

GEYGER'S Lessee *v.* GEYGER.

Notice to produce papers.

If notice of a rule to produce deeds and papers be served on an attorney, whose client resides at a distance, the trial will be postponed, until full opportunity has been afforded him to communicate with his client.[1]

The court will not make an order for the production of deeds, which are duly recorded, unless a special reason be assigned.

A RULE had been obtained by the plaintiff, requiring the defendant to show cause why an order should not be made for the production of certain deeds and papers, on the trial of this cause, agreeable to the provision of the 15th section of the judicial act: and now, on proof that a copy of the rule was served on the plaintiff's attorney, it was moved to make the same absolute.

*333] *But, for the *defendant*, it was contended, that the notice of the rule should have been given to the party, and not to his attorney. In *Rivers* v. *Walker*, 1 Dall. 81, notice, in the case of referees, is directed to be given to the party; and the reason is stronger in the present instance, as the defendant lives at a great distance, and the attorney ought not to be put to the trouble and expense of transmitting the notice. Besides, there is no certificate produced, that the deeds are not on record; and the fact is, that they are recorded; so that the plaintiff might, at any time, procure exemplifications.

BY THE COURT.—The provision contained in the judicial act was intended to prevent the necessity of instituting suits in equity, merely to obtain from an adverse party, the production of deeds and papers relative to the litigated issue. The act says, generally, that the court shall have power, "on motion, and due notice thereof being given, to require the parties to produce books or writings, &c.," without designating to whom the notice shall be given, the party himself, or his attorney. But we will always keep the cause under our control, for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney, whose client lives at a great distance, this will always be deemed a sufficient reason to postpone the trial, until a full opportunity has been afforded for the attorney's communicating the rule to the client. If likewise, the court find that the deeds are actually on record, we will not indulge the party with a rule for producing them, merely as a cheap mode of procuring evidence. The originals may, sometimes, indeed, be necessary, for a special reason, detached from the evidence; but in that case, the special reason must be assigned to the court.

The defendant's counsel offering to refer their opponents to the pages, &c., where the deeds in question are recorded, THE COURT declared, that this put an end to the matter; but added, that if it was not satisfactorily done, they would not allow the cause to be brought to trial.

Levy and *Blair*, for the plaintiff. *Tilghman* and *Armstrong*, for the defendant.

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[1] See Rose v. King, 5 S. & R. 241.

UNITED STATES *v.* CALDWELL.

Process of contempt.

An attachment will not be awarded against a witness, unless the *subpœna* have been actually served; and all the documents on which it is granted must be filed.

THIS was an indictment for a misdemeanor, committed in Northumberland county, in which a *subpœna* had issued, on the part of the defendant, to summon Samuel McClay, Esq., and John McPherson, Esq., associate judges of the county courts of Northumberland, to appear in the circuit court as *witnesses, on the 4th of May. The *subpœna* was served on Mr. McClay, on the 28th of April, and on Mr. McPherson, the next [*334 day. *E. Tilghman* now produced an affidavit, "that they were material witnesses, without the benefit of whose testimony, the defendant apprehended and believed he could not safely proceed to trial;" and moved for a postponement, not only in this case, but also in cases of Montgomery, Lang and Stockman; in which, to save expense, no *subpœna* had issued, though the same persons were material witnesses for the respective defendants.

Rawle, the district-attorney, objected, that from the 4th of May, when the *subpœna* was returnable, a sufficient time had elapsed to have brought the witnesses to Philadelphia upon an attachment; but he consented to consider the *subpœna* as having issued in all the causes. There was no legal necessity for the witnesses, merely because they were county judges, to attend the *nisi prius* of the supreme court, which is alleged in excuse for their absence; and as this is not a capital case, the application for delay is not entitled to be treated with any peculiar indulgence.

E. Tilghman replied, that the *subpœna* had been served in a seasonable time; and although no attachment had been moved for, it is some excuse for the defendant, that he expected the trials for treason would first come on; and for the witnesses, that their official situation seemed to prescribe a respectful attention to the judges of the supreme court, who were then holding a court of *nisi prius*, in the county of Northumberland.(*a*) But after the oath which the defendant has taken, the court will not presume, that his application for delay is without just cause; and if there is just cause, they will not compel him to proceed to a trial, under such disadvantages. Besides, it is not desired, to put off the trial until the next term, but only for a few days, that an express may be sent for the witnesses; as, with the benefit of their testimony, it is immaterial to the defendant, when he shall be tried. Though, if the delay is limited to a few days, it will be necessary, in order to remove all future cavil, to move for an attachment against the witnesses.

BY THE COURT.—We have no hesitation in granting the indulgence of a delay for a few days. The cause may, therefore, be continued until this day week; and in the meantime, let the attachment issue; but it can only

(*a*) PATERSON, Justice.—We pay no respect to persons: the law operates equally upon all; the high and low, the rich and poor. If we issue a *subpœna* to a justice or a judge, and it is not obeyed, we should be more strict in our proceedings against such characters, than against others, whose office did not so strongly point out their duty.

be in the case, in which the *subpœna* has been actually served. The practice must always *be strict in the previous stages of the business, before an attachment can be awarded; and all the documents, upon which it is awarded, must be filed with the court.

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United States *v.* Montgomery.

Process of contempt.

An attachment against a witness, for contempt, must be served by the marshal, in any part of his district.

An attachment being awarded against the witnesses, who did not attend at the return of the *subpœna* that had issued in this cause, on the part of the defendant, the marshal, Nichols, suggested that they resided in a distant county, and asked the opinion of the court, whether it was his duty to serve the process.

By the Court.—An attachment is the process of the court, regularly issuing for the administration of justice; and therefore, must be served by the marshal.

United States *v.* The Insurgents of Pennsylvania.[1]

Trial for treason.—Jury.—Copy of indictment.

At common law, the court may direct any number of jurors to be summoned, on a consideration of all the circumstances under which the *venire* is issued.

The act of congress which refers the federal courts to the state laws, for certain regulations respecting juries, has respect to the designation and qualification of the jurors, and not to the number of which the panel should consist.

A copy of the caption of the indictment, as well as of the indictment itself, must be delivered to the defendant, three days before the trial.

In the list of the jury and witnesses, furnished to the defendant, the township in which they reside must be given—the county is not sufficient; but the statute does not require their occupations to be stated.

Several indictments for high treason having been found against persons concerned in the insurrection in the four Western counties of Pennsylvania, a *venire* was issued in each case, for summoning a jury, returnable to the present term; and to each writ, the marshal returned a separate panel, containing the names of thirty-six jurors from the city of Philadelphia, sixteen from the county of Delaware, nine from the county of Chester, and twelve from each county in which the treason was charged to have been committed, making twenty-two jurors on each panel, and one hundred and eight jurors summoned on the whole.

The act of congress (1 U. S. Stat. 88, § 29) having directed "that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses to be produced on the

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[1] For a full account of the western insurrection in Pennsylvania, see Findley's History of that event, and Brackenridge's History of the same transaction, in which the writers consider the subject from opposite political stand points.

trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him, at least three entire days before he shall be tried for the same," the attorney for the district had, in due time, delivered to the several prisoners copies of the indictment, of the panel of jurors, and of the list of witnesses; but he had omitted to deliver a copy of the caption of the indictment, and to specify the occupations, or the places of abode of the jurors and witnesses, otherwise than by mentioning the counties in which the jurors respectively resided.

*On this state of facts, *Lewis* suggested the following exceptions; which, he said, were not so much designed for the existing cases, as to prevent the introduction of precedents, injurious to the rights and safety of posterity. [*336

1st. That the marshal had returned a greater number of jurors than the law authorised; and that he had returned a several panel in each case, instead of one general panel to try all the issues at this court.

By the act of congress (1 U. S. Stat. 88, § 29), it is declared, that "in cases punishable with death, the trial shall be had in the county where the offence is committed, or where that cannot be done, without great inconvenience, *twelve petit jurors shall, at least, be summoned from thence.* And jurors in all cases to serve in the courts of the United States shall be designated by lot, or otherwise, in each state respectively, according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors, by the laws of the state of which they are citizens, to serve in the highest courts of law of such state, and shall be returned as there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services."

By the act of Pennsylvania, for the better regulation of juries (2 Dall. Laws, 263, § 4), it is declared, "that every sheriff, or any officer, to whom the return of *venire facias juratores*, or other process for the trial of causes before the judges of oyer and terminer, general jail delivery, and *nisi prius* doth belong, shall, upon return thereof, unless in cases where a special jury shall be struck by rule of court, annex a panel to the said writ, containing the Christian and sur-names, additions, and places of abode, of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every such writ, for the trial of all issues in civil and criminal causes at the said courts, in each respective county; which number of jurors, in any county, shall not be less than forty-eight, nor more than sixty, without the direction of the judge or judges appointed to go to the circuit, and sit as judge or judges of oyer and terminer, general jail delivery, or *nisi prius*, in such county, who are hereby empowered and required, if he or they see cause, by order, under his hand or their hands, to direct a greater number, not to exceed eighty, &c."

By the same act (§ 5), it is further declared, "that the sheriff of the county of Philadelphia, or other county where the *supreme court of judicature shall be holden, or other officer to whom the return of the [*337

venire facias juratores, or other process for the trial of causes at bar before the justices of the supreme court, doth belong, shall, upon return thereof, unless in cases where a special jury shall be struck by rule of court, annex a panel to the said writ, containing the Christian and sur-names, additions and places of abode, of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every such writ, for the trial of all issues to be tried at the bar of the said court, during the ensuing term, which number of jurors shall not be less than forty-eight, nor more than sixty, &c."

The laws of the state being thus made for the federal courts, *Lewis* contended, that, in no case, could the marshal be authorized to return more than eighty jurors; that the power of extending the panel to that number does not vest in the circuit court, sitting in its ordinary character, as the act only vests it in the courts of oyer and terminer, general jail delivery, and *nisi prius*; but that in the present instance, even that number, and without the order of the court, had been far exceeded, since twelve jurors had been summoned from each of the four counties in which the charges were laid, and sixty had been summoned from other parts of the state, making in the whole one hundred and eight, which he considered as an unnecessary, as well as an expensive and oppressive, call on the citizens. He insisted that, as different charges were laid in the four counties, forty-eight jurors should have been summoned from them, and only the number necessary to complete the panel of sixty, or, in case of a special order, the panel of eighty might be summoned from any other part of the state. In England, the power of summoning jurors is limited to forty-eight, unless by the special order of the justices of oyer and terminer and general jail delivery. Kelyng, 16. The act of congress does not direct, that the twelve jurors, to be brought from the county where the offence was committed, shall be over and beyond the sixty jurors directed by the state law to be summoned; nor does it permit the marshal to summon the jurors whence he pleases, without the express order of the court.

The return of several panels for the trial of each issue, *Lewis* deemed to be equally inconsistent with the terms and policy of the Pennsylvania law, which the law of congress had likewise adopted. Great inconvenience had been experienced from such a practice; and the state legislature, as a reformation in the system of jurisprudence that previously prevailed, expressly enacted, that the panel annexed to every writ of *venire facias juratores*, should be "for the trial of *all* issues to be tried at the bar of the said court, during the said term."

*338] 2d. That a copy of the *caption* of the indictments, as well as *a copy of the indictments themselves, had not been delivered to the respective prisoners.

The caption is material, for it must state the judges before whom, the grand jury by whom, the time when, and the place where, the indictment was preferred. For if the judges sit without a commission, or the commission has expired; if the grand jury was composed of a number less than twelve, or the members of it were not qualified according to law; if the indictment was found at a place where the court was not authorized to sit, or at a time when, in fact, it was not sitting, the prisoner is entitled to take advantage of the defect, and he cannot have the opportunity of

doing so, unless he is furnished with the caption of his indictment. On the same principle, Foster contends for the same privilege; and declares it to be founded on the constant practice, though the act only mentions a copy of the indictment. Fost. Cr. L. 229. And Blackstone, as well as Foster, shows that it is of importance, that the prisoner should receive the copy, before arraignment, "for then is his time to take exceptions to the indictment, by way of plea or demurrer." 2 Hawk. c. 25, § 118. In reason, and in effect, the caption is a part of the indictment. Whenever it becomes necessary to exemplify the indictment, the caption must accompany it; and no inferences drawn from the practice respecting indictments for other offences (where the caption is not supplied, as it is said, until the record is finally made up), can be applicable to the present question, since in no other case, but treason, is the delivery of a copy of the indictment prescribed as a preliminary to the trial. Nor is there any essential distinction between this court, and the courts to which the cited authorities relate, for although the jurisdiction of the court is ascertained and known, the constitutionality of the commissions of the judges who compose it, the legality of the number and qualifications of the grand-jury who attend it; the place of its sessions, &c., will still afford ample materials for investigation and just objection.

3d. The lists furnished to the respective prisoners do not contain a sufficient specification of the addition and places of abode of the jurors and witnesses.

By the act of congress (1 U. S. Stat. 88, §§ 28, 29), as well as the act of Pennsylvania (2 Dall. Laws, 263), the specification of the place of abode of the jurors is prescribed, and the Pennsylvania act, which is adopted by the other, calls likewise for the additions of the jurors. It is true, that in the copy of the panel, the county is mentioned from which the jurors respectively are summoned, but as the sheriff could not, in a case arising under the state jurisdiction, summon any citizens as jurors, who were not inhabitants of the proper county, the act, when it requires a specification of the place of abode, cannot *surely be satisfied by merely mentioning the county. The express relation between the state and federal laws on the subject [*339 demands an analogous conclusion, in a case arising under the jurisdiction of the general government, and the general reasons for furnishing such information to prisoners acquire great additional force, from a consideration of the distance between the place of trial and the place where the offence is charged to have been committed.

In answer to these exceptions, *Bradford*, the attorney-general of the United States, and *Rawle*, the attorney of the district, premised, that they were also impressed with the propriety and necessity of establishing sound and permanent principles on this first discussion of the doctrine of treason, as it applied to the existing constitution of the United States; but they contended—

1st. That the exception to the number of jurors returned, and to the mode of returning separate panels, ought not to be allowed. They observed, that the leading question on this point called for a decision, whether, when a federal court was referred by an act of congress to state regulations for its government, the state law, in its strict words, or in the practice under it, should furnish the rule. But even from the context of the judicial act

of congress, an intention cannot reasonably be inferred, to incorporate all the provisions of the Pennsylvania act relating to jurors, into the practice of the federal courts. The reference to the state laws respects only the mode of designating the jury by lot, or otherwise, and the qualification of the jurors; it does not respect the number to be returned on the panel, which is still left (under the power of framing writs suited to the exigency of every case (1 U. S. Stat. 276), in the discretion of the court, to be prescribed by *venire*, as at common law. But the Pennsylvania act, without admitting such a distinction, must produce the greatest embarrassment; for it prescribes a different number of jurors to be returned to different courts, and there is nothing in the act of congress to determine which number shall be adopted here.

The act of Pennsylvania, however, had obviously an economical object in view, when it limited the number of jurors to sixty, as a compensation was originally allowed for their attendance, though it has since been repealed (2 Dall. Laws, 268); and the practice of the supreme court, it is believed, changed in consequence of the repeal. But even taking the act of Pennsylvania as an indispensable rule, it is substantially complied with. The act of congress introduced a particular regulation for the trial of offenders, which required that twelve jurors should be taken from the county where the offence is charged to have been committed; and this is done. The act of Pennsylvania authorized sixty jurors to be summoned; and in addition to the twelve from the proper county, the marshal *has, accordingly, summoned sixty from the state at large. To each *venire* there are no more than seventy-two jurors returned. *340]

The return of a separate panel in each case is, likewise, perfectly consistent with law, practice and public convenience. The indictments depending are all separate; none of them are joint. The exception, however, if it is at all available, goes to the *venire*, and not to the panel; for the latter is in strict conformity to the former. After the court has prescribed that twelve of the jurors shall be brought from the proper county, the marshal has a legal discretion to bring the rest from any part of the district that he pleases. The court will not, and cannot, interfere with the exercise of that power, unless it becomes necessary, in order to obtain an impartial jury. There must be as many panels, as there are counties, in which offences are charged to have been committed; and if twelve jurors are taken from the proper county for each case, there can be no legal ground to object that the same sixty, to complete the panel of seventy-two, are returned to all the cases. But the adverse doctrine would require the jurors to be brought from every county in which an offence is charged. Suppose, therefore, five counties involved, sixty jurors would, of course, be returned from them; and if the court (as it has been contended) cannot increase that number, then a pirate, or any other felon, charged with an offence committed out of those counties, could not be brought to trial at the same term.

2d. That it is not necessary, nor is it material, to furnish the prisoner with a copy of the caption, as well as of the indictment. The act of congress must be presumed to have been passed with a full knowledge of the state law; and by the state law, evinced and supported by a constant practice, nothing more than a copy of the indictment was required. 1 Dall. 33. Sufficient appears on the indictment to show, what it is incumbent on the

prosecutor to show. The case referred to in Fost. p. 229, was that of a special court, where a caption is undoubtedly necessary; and the distinction is expressly so taken. Fost. 11; 2 Hawk. c. 25, § 126.(*a*)

3d. That the addition of the jurors and witnesses, as to the place of abode, is sufficient; but if the court think otherwise, time will be allowed to amend it. The act of congress, however, does not require a specification of the occupation of the jurors and witnesses, but only of their names and places of abode; and it cannot be controlled by the provision of the state act, which is in that respect different; but must be deemed substantive and independent.

*On the 18th of May, the Judges of the COURT delivered their opinions to the following effect. [*341

PETERS, Justice.—I have considered the objections made to the panels, and do not conceive these objections relevant. Although, in ordinary cases, it would be well to accommodate our practice with that of the state, yet the judiciary of the United States should not be fettered and controlled in its operations, by a strict adherence to state regulations and practice. But I see not that, in a liberal view and construction of the laws of the United States on this subject, a rigid adherence to all the local and economical regulations of the state, is directed or necessary. It should seem, that the most pointed reference was had to the designation and qualification of jurors, and not to the exact numbers of which the panel should consist. The legislature of a state have in their consideration a variety of local arrangements, which cannot be adapted to the more expanded policy of the nation. It never could have been in the contemplation of congress, by any reference to state regulations, to defeat the operation of the national laws. Now, there are cases, which have been stated, in which some of the criminal laws of the United States may be rendered impracticable, by an adherence to the rule of numbers prescribed as to jurors, in criminal cases, by the state law; and especially, if there must be but one panel, as has been contended. Yet, the most substantial requisites, to wit, the qualifications of jurors and mode of selection, may be adhered to. As to the clause in the law of the United States, directing, that "the laws of the states (with certain exceptions) shall be regarded as rules of decision, in trials at common law in the courts of the United States," I do not think, it applies to the case before us.

All the arguments founded on the inconveniences to the defendants, if, in this case particularly, any such exist (of which I much doubt), weigh lightly when set against the delays and obstructions which the objection would throw in the way of the execution of the laws of the nation.

PATERSON, Justice.—The objections that have been suggested on this occasion, are principally founded on the 29th section of the judicial act of congress, which refers the federal courts to the state laws, for certain regulations respecting juries. But the words of this reference are clearly restricted to the mode of designating the jury, by lot or otherwise; and to the

(*a*) PATERSON, Justice.—The case of special courts, or of inferior courts held by charter, &c., can furnish no analogy for this court, which is a court of original and permanent jurisdiction. The proceedings in the King's Bench can alone be applicable.

qualifications which are requisite for jurors according to the laws and practice of the respective states. Since, therefore, the act of congress does not itself fix the number of jurors; nor expressly adopt any state rule for the purpose, it is a necessary consequence, that the subject must depend on the common law; and, by the common law, the court may direct any num-
*342] ber *of jurors to be summoned, on a consideration of all the circumstances under which the *venire* is issued. There are instances, indeed, where five juries have been summoned upon a trial for high treason, in order that, after the allowance of the legal challenges, a competent number might still be insured. In the present instance, the precept requires the marshal to return at least forty-eight jurors; and he has not, in my opinion, been guilty of any excess, in the exercise of that discretion for returning a greater number, with which he is legally invested.

Neither is the mode of making his return justly exceptionable. As the act of congress directs that twelve jurors shall be summoned from the county in which the offence was committed, I cannot conceive any more proper, or more legal, way of proceeding, than by issuing a *venire* in each case; and then, there must, of course, be a separate panel returned, in conformity to every writ. Thus, likewise, the act of congress and the state act have been reconciled, and both put into operation; twelve jurors being returned in pursuance of the former, and sixty jurors being returned, in pursuance of the latter law.

With respect to the objection, that a copy of the caption of the indictment has not been furnished to the prisoners, it may be observed, that, although the practice of Pennsylvania has been different, yet, the caption and the indictment seem naturally to form but one instrument; and copies of both should, therefore, be delivered under the provisions of the act of congress. There can be little inconvenience in adopting this rule; and it is calculated to avoid much difficulty and controversy.

The objection, that the place of abode of the jurors and witnesses, has not been sufficiently designated, in the lists furnished to the prisoners, is, likewise, in our opinion, a valid one. The object of the law was, to enable the party accused to prepare for his defence, and to identify the jurors who were to try, and the witnesses who were to prove, the indictment against him. It is contrary to the spirit and intent of such a provision, that the whole range of the state, or of a county, should be allowed, as descriptive of a place of abode; and it is the duty of the judges so to mould the practice and construction of statutes, as to render them reasonable and just. With regard to the place, therefore, we think the townships in which the jurors and witnesses respectively reside, should be specified; but the act of congress does not require a specification of their occupations, and the niceties of the state act, are not, in that respect, incorporated into the federal system.

In consequence of this decision, the trials were suspended, in order to give the attorney of the district the three days required by the act of congress, for delivering to the prisoners, amended copies of the caption and indictment, and of the lists of jurors and witnesses.

* United States v. Stewart.

Same v. Wright.

Trial for treason.—Bail.

A reasonable time will be allowed, after the list of witnesses is furnished to the defendant, to enable him to procure testimony from the counties in which the witnesses reside.

The prisoners being brought to the bar, on separate charges of high treason, *Lewis* read their depositions, stating the absence of material witnesses in both cases, and moved to postpone the trials, until an opportunity was given, to procure the attendance of those witnesses from the western counties. He urged, the general inconvenience of a commitment and trial at so great a distance from the scene of the criminal transaction; the friendless situation of the prisoners, and the poverty of the witnesses; and he alleged, that, under such circumstances, an immediate trial would be a mere *ex parte* proceeding. To show the lenity with which persons thus charged have always been treated, he cited Fost. Cr. L. 1; and to account for the delay in procuring the witnesses, he observed, that as the act of congress (1 U. S. Stat. 88, § 29) declared that, "in cases punishable with death, the trial shall be had in the county where the offence was committed," if it could be done, without great inconvenience, the prisoners might reasonably have expected that indulgence, until the motion for a special court had been refused, on account of the peculiar difficulties of the case, in opposition to the general inclination of the judges. Nor could there be any preparation for trial, until the charge was known, and the names of the witnesses who were to prove the indictments. By the practice under the constitution and laws of Pennsylvania (and the case is the same here), a defendant cannot have compulsory process to bring in his witnesses, before he has sworn that they are material; and he cannot so swear, until he knows the charge and the witnesses that support it. It is essential to the administration of justice, and to the feelings of humanity, that the defendants should have time to investigate the characters of witnesses, and to bring proofs in contradiction to the accusation. Hence, even in England, where the counties are generally smaller than in this country, a period of ten days is allowed, between the time of furnishing lists of the witnesses and jurors, and the time of trial (7 *Ann.*, *c.* 21; 4 Bl. Com. 345); and although the act of congress (1 U. S. Stat. 118, § 29) only says that copies of the indictment and a list of the jury and witnesses shall be delivered to the prisoner "*at least, three entire days* before he shall be tried," yet it must certainly be the intention of the legislature to afford an opportunity to canvass the characters of the *witnesses, or the provision would be nugatory: that opportunity [*344 cannot be deemed to commence, until he knows their names, and it cannot be deemed to be complete, unless he has had time to send for information to the places in which they reside. The court will, therefore, exercise a discretion as to the length of time to be allowed, in proportion to the distance; and conformable to the case in Fost. 1, the time so allowed for preparation will be subsequent to the delivery of the copy of the indictment, and the lists of witnesses.

Rawle (attorney for the district) premised, that an acquiescence in the present motion, would, probably, put off the trial for the term. He urged,

that the prisoners must long ago have known the nature of the charge, and the proofs necessary to their defence; and ought to have made an earlier application for the aid of the court to procure their witnesses. Due diligence has not been used, nor, indeed, is it so stated in the affidavits; and it is not only necessary to satisfy the court that the witnesses are material; but also that the party applying has been guilty of no *laches* or neglect, in omitting to apply to them and endeavoring to procure their attendance. 3 Burr. 1513. Ever since the 20th April, there has been an opportunity to make this motion; which was not the case in Fost. 1, as that arose before a special court, acting under a special commission, for special purposes. Nor can there be a just reason to object to the trial's coming on, because of the place at which the court is held. On the motion for a special court, sufficient was disclosed to show, that the indictments would be presented in Philadelphia; and it was a mere speculation afterwards to suppose that another place would be appointed for the trials; particularly, as all the jurors and witnesses had been actually summoned.

By the Court.—The only argument of weight in support of the present motion, is that which relates to the period of furnishing the prisoners with the names of the witnesses; but it is, of itself, conclusive: for, unless an opportunity were afterwards given to investigate the characters, and trace the conduct of the witnesses, it would be nugatory and delusive to furnish the list of their names. The act directs notice to be given; this must be intended for the purpose alluded to, and, for the attainment of that purpose, time is, undoubtedly, necessary. It must, therefore, be considered as a rule in this case, and in all other cases of a similar nature, that a reasonable time shall be allowed, after a list of the names of the witnesses is furnished to the prisoners, for the purpose of bringing testimony from the counties in which those witnesses live.

The trials of Stewart and Wright were, accordingly, postponed; and it was then agreed, that they should not be brought on, until the trial of the other prisoners, who were ready for trial, was *concluded; but so much time was consumed in this previous business, that the judges declared they could not longer protract the sitting of the court, on account of other circuits, and therefore, directed the cases of Stewart and Wright to be continued generally until the next term. It appeared, however, that on the preceding day, *Lewis* had informed the attorney for the district, that he would proceed to trial in the case of Stewart, with the testimony already in his possession, though he expected other witnesses; and on this ground, as the court was about to break up, he moved, that Stewart should be admitted to bail. But—

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By the Court.—It was Stewart's own fault, not the fault of the prosecutor, that the trial was postponed. He has now the same witnesses that he had at the time of the postponement; but the judges cannot, consistently with their other duties, enter on the trial. It is true, that we have established it as a principle, that no *laches* should be imputed to the prisoner, for taking time to send into the counties where the witnesses for the prosecution reside, after he has received notice of their names; but that is not the case at present. Stewart has no claim upon the legal discretion of the court; and indeed, the circumstances must be very strong, which will, at any time, induce us to admit a person to bail, who stands charged with high treason.

UNITED STATES *v.* PORTER.

Jury.— Withdrawal of challenge.

The panel being exhausted, the court will permit the prisoner to retract his challenge to a juror, who may, thereupon, be sworn on the jury.

INDICTMENT for high treason, committed in the county of Allegheny, in the state of Pennsylvania, by levying war against the United States. After a long examination of witnesses, it was discovered, that the defendant, though he was at Couche's Fort, had taken no part in the insurrection, that, in fact, he was not the person liable to the charge, but another person of the same name; and thereupon, the jury, by direction of the court, found a verdict of not guilty.

The only occurrence, therefore, which it is material to notice on this trial, was the following. There were two of the petit jury (Thomas Coates and William Callady), who being called and not challenged, alleged sickness in excuse for not serving, and they were, for the present, set apart: but the whole panel having been eventually drawn out of the balloting box, without furnishing twelve names unchallenged, and those jurors persevering in their excuse, the counsel for the prisoner retracted his challenge of another juror, who was, thereupon, qualified, by order of the court.

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*UNITED STATES *v.* VIGOL. [*346

Indictment for treason.—Duress.— Verdict.

The fear which the law recognises as an excuse for the perpetration of an offence, must proceed from an immediate and actual danger, threatening the very life of the party.

If an *overt* act of treason be proved, and it be laid to have been committed before the charge was presented, it is sufficient: whether committed by the number of insurgents specified in the indictment, is immaterial.

In a capital case, a sealed verdict cannot be received.

INDICTMENT for high treason, in levying war against the United States. The prisoner was one of the most active of the insurgents in the Western counties of Pennsylvania, and had accompanied the armed party, who attacked the house of the excise officer (Reigan's), in Westmoreland, with guns, drums, &c., insisted upon his surrendering his official papers, and extorted an oath from him, that he would never act again in the execution of the excise law. The same party then proceeded to the house of Wells, the excise officer in Fayette county, swearing that the excise law should never be carried into effect, and that they would destroy Wells and his house. On their arrival, Wells had fled and concealed himself; whereupon, they ransacked the house; burned it, with all its contents, including the public books and papers; and afterwards discovering Wells, seized, imprisoned and compelled him to swear, that he would no longer act as excise officer. Witnesses were likewise examined, to establish that the general combination and scope of the insurrection, were to prevent the execution of the excise law by force; and in the course of the evidence, the duress of the marshal of the district, the assembling at Couche's, the burning of general Neville's house, &c., were prominent features.

As no question of law arose upon the trial, but the case rested entirely

on a proof of the *overt* acts by two witnesses, *M. Levy* and *Lewis*, for the defendant, and that the attorney of the district agreed, without argument, to submit to the decision of the jury, under the charge of the court; which was delivered to the following effect.

PATERSON, Justice.—The first point for consideration, is the evidence which has been given, to establish the case stated in the indictment; the second point turns upon the criminal intention of the party; and from these points (the evidence and intention) the law arises.

With respect to the evidence, the current runs one way: it harmonizes in all its parts: it proves, that the prisoner was a member of the party who went to Reigan's house, and afterwards, to the house of Wells, in arms, marshalled and arrayed; and who, at each place, committed acts of violence and devastation.

With respect to the *intention*, likewise, there is not, unhappily, the slightest possibility of doubt: to suppress the office of excise, in the fourth survey of this state; and particularly, in *the present instance, to *347] compel the resignation of Wells, the excise officer, so as to render null and void, in effect, an act of congress, constituted the apparent, the avowed object of the insurrection, and of the outrages which the prisoner assisted to commit.

Combining these facts, and this design, the crime of high treason is consummate, in the contemplation of the constitution and law of the United States.

The counsel for the prisoner have endeavored, in the course of a faithful discharge of their duty, to extract from the witnesses some testimony, which might justify a defence, upon the ground of duress and terror. But in this they have failed; for the whole scene exhibits a disgraceful unanimity; and with regard to the prisoner, he can only be distinguished for a guilty pre-eminence in zeal and activity. It may not, however, be useless, on this occasion, to observe, that the fear, which the law recognises as an excuse for the perpetration of an offence, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste or fire; or even an apprehension of a slight or remote injury to the person, furnish no excuse. If, indeed, such circumstances could avail, it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers, by uttering previous menaces; an avenue would be for ever open for the escape of unsuccessful guilt; and the whole fabric of society must inevitably be laid prostrate.

A technical objection has been suggested in favor of the prisoner. It is said, that the offence is not proved to have been committed, on the day, nor the number of the insurgent party to be so great, as the indictment states. But both these exceptions, even if well founded in fact, are immaterial in point of law. The crime is proved, and laid to have been committed before the charge was presented; and whether it was committed by one hundred, or five hundred, cannot alter the guilt of the defendant. If, however, the jury entertain any doubt upon the matter, they may find it specially.

Verdict, guilty. (*a*)

(*a*) The court having waited about an hour for the jury (until half past ten o'clock

*United States v. Mitchell.

Treason.—Evidence.

An insurrection, to prevent by force and intimidation, the execution of an act of congress, is treason, by levying war.

A bare conspiracy is not treason; there must be an *overt* act, proved by two witnesses.

On a trial for treason, a copy of a letter, inciting to insurrection, is admissible in evidence, on proof that it was one of the copies actually circulated.

Evidence is not admissible, that the defendant joined in the commission of a distinct felony, for which he is charged in another indictment: there being no evidence that such felony was committed with a treasonable intent.

Indictment for high treason, by levying war against the United States. It was alleged, that the prisoner was one of the party that assembled at Couche's Fort, armed; that he proceeded thence to Gen. Neville's, and assisted at the burning of the general's house; that he attended with great zeal at the meeting at Braddock's field; and that on the day prescribed for signing a submission to the government, he was intoxicated, refused to sign himself, and was active in dissuading others from signing. The circumstance of the prisoner's being at Couche's, was proved by a number of witnesses; his being at Braddock's field, by one witness and his own confession; but there was only one positive witness to the fact of his having been at the burning of general Neville's house, though a second witness said, "it ran in his head, that he had seen him there," and a third declared, that he had passed him on the march thither. The scope of the testimony, as it respected the general object of the insurrection, and as it particularly applied to the prisoner, will be found sufficiently stated in the course of the arguments and charge.

The Attorney of the District (*Rawle*) having closed the evidence, proceeded to state the law, in support of the prosecution. So frequently and fully has the offence of levying war against the government been defined, that a doubt can hardly be raised upon the subject. Kings, it is true, have endeavored to augment the number, and to perplex the descriptions of treasons, as an instrument to enlarge their powers, and to oppress their subjects; but in republics, and particularly, in the American republic, the crime of treason is naturally reduced to a single head, which divides itself into these constitutional propositions: 1st. Levying war against the government; and 2d. Adhering to its enemies, giving them aid and comfort. In other words, exciting internal, or waging external, war, against the state. The second branch of the crime, thus designated, renders it unlawful and

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at night), adjourned until eleven o'clock the next morning. Just after the adjournment took place, the jury requested to see Foster's Crown Law, and the Acts of Congress, which, by consent, were accordingly sent to them. I am told, that they remained together until between three and four o'clock in the morning, when they wrote, signed and sealed up their verdict, and adjourned. On the next morning (the 23d of May 1795), they appeared at the bar; and being called over, offered the written verdict, sealed up, to the clerk. But The Court said, that the paper could not be received. The foreman then pronounced the verdict, *vivâ voce*, and again offered the written verdict; but The Court repeated, "We cannot open or receive it." Nothing was said, publicly, of the jury's having adjourned. The defendant was eventually pardoned.

treasonable for any citizen to adhere to a foreign, public enemy, whether assailing the frontiers, or penetrating into the heart of our country. But while such a co-operation endangers the success and prosperity of the community, the effects *of domestic insurrection (which the first branch of the division contemplates) strike at the root of its existence; and in free countries, above all, must be prevented, or corrected, by the most vigilant and efficient sanctions of the law.

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What constitutes a levying of war, however, must be the same, in technical interpretation, whether committed under a republican, or a regal, form of government; since either institution may be assailed and subverted by the same means. Hence, we are enabled, in the first stage of our own experience, to acquire precise and satisfactory ideas upon the subject, from the matured experience of another government, which has employed the same language to describe the offence, and is guided by the same rules of judicial exposition. By the English authorities, it is uniformly and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent, by force and terror, the execution of a law, is an act of levying war. Doug. 570. Again, an insurrection, with an avowed design to suppress public offices, is an act of levying war: and although a bare conspiracy to levy war, may not amount to that species of treason; yet, if any of the conspirators actually levy war, it is treason in all the persons that conspired; and in Fost. 218, it is even laid down, that an assembly armed and arrayed in a warlike manner for a treasonable purpose is *bellum levatum*, though not *bellum percussum*. Those, likewise, who join afterwards, though not concerned at first in the plot, are as guilty as the original conspirators; for in treason all are principals; and whenever a lawless meeting is convened, whether it shall be treated as riot or treason, will depend on the *quo animo*. 4 Bl. Com. 81; 1 Hale H. P. C. 123–4; Fost. 213, 210, 215, 218; 1 Hawk. P. C. 37; 4 Bl. Com. 35; 1 Hale P. C. 440; 8 St. Tr. 247; 2 Ibid. 586–7; Kelyng 19; 3 Inst. 9.

The evidence, unfortunately, leaves no room for excuse, or extenuation, in the application of the law to the prisoner's case. The general and avowed object of the conspiracy at Couche's Fort, was, to suppress the offices of excise in the fourth survey. As an important measure for that purpose, it was agreed to go to General Neville's house, and compel him to surrender his office and his official papers. Some of the persons who were at Couche's Fort, went, accordingly, to General Neville's, and terminated a course of lawless and outrageous proceedings, by burning his house. The prisoner is proved by four witnesses to have been at Couche's Fort; and so far from opposing the expedition to General Neville's, he offered himself to reconnoitre. Being thus originally combined with the conspirators, in a treasonable purpose, to levy war, it was unnecessary that the purpose should be afterwards executed, in order to convict them *all of treason, and much less is it necessary to his conviction, that he should have been present at the burning of General Neville's house, which was the consummation of their plot, or that the burning should be proved by two witnesses. But he is, likewise, discovered, by one of the witnesses at least, within a few rods of the General's, at the moment of the conflagration; and he is seen marching in the cavalcade which escorted the dead body of their leader, in melancholy triumph, from the scene of action to Barclay's house. It is not necessary to consider the

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meeting at Braddock's field as an independent treason, though the avowed intention was to attack the garrison at Pittsburgh, and to expel certain public officers from the town; but the conduct of the prisoner on that occasion, concurring in every violent proposition that was made; and his refractory and seditious deportment on the day prescribed for signing the declaration of submission to the laws, are corroborative demonstrations of that *mala mens*, that dark and dreary turbulence of soul, which is regardless of every social, moral and religious obligation.(*a*)

The counsel for the prisoner (*E. Tilghman* and *Thomas*) premised, that they did not conceive it to be their duty to show, that the prisoner was guiltless of any description of crime against the United States, or the state of Pennsylvania; but they contended, that he had not committed the crime of high treason; and ought, therefore, to be acquitted upon the present indictment. The adjudications in England upon the various descriptions of treason, have been worked, incautiously, into a system, by the destruction of which, at this day, the government itself would be seriously affected: but even there, the best judges, and the ablest commentators, while they acquiesce in the decisions that have already taken place, furnish a strong caution against the too easy admission of future cases, which may seem to have a parity of reason. Constructive, or interpretative treasons, must be the dread and scourge of any nation that allows them. 1 Hale, P. C. 132, 259; 4 Bl. Com. 85. Take, then, the distinction of treason by levying war, as laid down by the attorney of the district, and it is a constructive or interpretative weapon, which is calculated to annul all distinctions heretofore wisely established in the grades and punishments of crimes; and by whose magic *power, a mob may easily be converted into a conspiracy; and a riot aggravated into high treason. Such, however, is not the sense [*351 which congress has expressed upon this very subject; for, if a bare opposition to the execution of a law can be considered as constituting a traitorous offence, as levying war against the government, it must be equally so in relation to every other law, as well as in relation to the excise law; and in relation to the marshal of a court, as much as in relation to the supervisor of a district: and yet, in the penal code of the United States, the offence of wilfully obstructing, resisting or opposing any officer, in serving or attempting to serve any process, is considered and punished merely as a misdemeanor. (1 U. S. Stat. 117, § 22.) Let it be granted, that to compel congress to repeal a law, by violence or intimidation, is treason (and the English authorities, rightly construed, claim no greater concession), it does not follow, that resisting the execution of a law, or attempting to coerce an officer into the resignation of his commission, will amount to the same offence. Let it be granted also, that an insurrection, for the avowed purpose of suppressing all the excise offices in the United States, may be

(*a*) PATERSON, Justice.—Before the defence is opened, I wish to direct the attention of the prisoner's counsel to two considerations: 1st. Whether the conspiracy to levy war at Couche's Fort, was not, in legal contemplation, an actual levying of war? 2d. Whether the proceedings at General Neville's house, were not a continuation of the act which originated at Couche's Fort? For, several witnesses have proved that the prisoner was at Couche's Fort, and one positive witness has proved, that he was at General Neville's house.

supervisor of a district. The analogy is, in a great measure, just: in either case, if the resistance is made by a few persons, in a particular instance, and under the impulse of a particular interest, the offence would not amount to high treason; but if, in either case, there is a general rising of a whole county, to *prevent the officer from discharging his duty in relation to the public at large, the offence is, unquestionably, high treason. Thus, an opposition was lately made to the appointment of a particular judge in Mifflin county, and he was forcibly driven from the bench; but the offence was prosecuted merely as a riot, upon this principle of discrimination, that the design was not to prevent the governor from appointing any judge, but only to displace an unpopular individual.

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Again, it has been urged, that the criminal intention must point to the suppression of all the excise offices in the United States, or it cannot amount to high treason. If it is meant by this argument, that the insurgents of Pennsylvania must have contemplated a march from Georgia to New Hampshire, it is extravagant and absurd: but in another view, it is perfectly correct; for if it was intended that, by their lawless career and example, congress should be forced into a repeal of the obnoxious law, it necessarily followed, that, from the same cause, the offices of excise would be suppressed throughout the Union. That universality of object, which the books require, was inseparable from the nature of the opposition; for it was impossible to contemplate the repeal of the excise law in one survey, or in one state, without affecting it in every survey, and in every state.

The truth is, however, that the insurgents did not entertain a personal dislike for Gen. Neville; but in every stage of their proceedings, at Couche's Fort, at the General's house, and at Braddock's field, they were actuated by one single, traitorous motive, a determination, if practicable, to frustrate and prevent the execution of the excise law. The whole was one great insurrection; and it is immaterial, at what point of time, or place, from its commencement to its termination, any man became an agent in carrying it on. Many persons, indeed, may have attended innocently at Couche's Fort (as was the case with Porter), but those would not remain long, after the purpose of the meeting was developed. To render any man criminal, he must not only have been present, but he must have taken part with the insurgents; yet, whether he was present at Couche's Fort, on the march to Gen. Neville's, or at the burning of the General's house, if his intention was traitorous, his offence was treason. 3 Inst. 9. The *overt* act laid in the indictment (which is drawn from the most approved precedents) is levying war; and war may be levied, though not actually made. Fost. 218. It is agreed, that this *overt* act must be proved by two witnesses; but there is a difference as to what constitutes the act itself. Now, it is manifest, from every authority, that to assemble in a body, armed and arrayed, for some treasonable purpose, is an act of levying war; this was the case at Couche's Fort; and the prisoner's active attendance there is proved by a number of witnesses. It is not *required, that every witness should have seen him, at the same spot, at the same moment, and in the same act; but if they see him at the place and time of rendezvous, exhibiting the same species of traitorous conduct, the law is satisfied. The conspiracy to levy war being effected, all the conspirators are guilty, though they did not all attend at Gen. Neville's house. 1 Hale, P. C. 132; Fost. 213, 215. Besides, the

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meeting at Braddock's field is a distinct and substantive act of treason; and the prisoner is proved by four witnesses to have been there. The design of the meeting was, avowedly, to oppose the execution of the excise law, to overawe the government, to involve others in the guilt of the insurrection, to prevent the punishment of the delinquents, to banish unpopular individuals from the town, and to attack the garrison of Pittsburgh. The hasty declarations of the *quo animo*, proceeding from the prisoner himself, ought not to have much weight, were they not so strongly corroborated by other testimony.

The charge of the COURT was delivered to the jury in substance as follows:

PATERSON, Justice.—The first question to be considered is, what was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of congress, by force and intimidation, the offence, in legal estimation, is high treason; it is an usurpation of the authority of government; it is high treason, by levying of war. Taking the testimony in a rational and connected point of view, this was the object: it was of a general nature, and of national concern.

Let us attend, for a moment, to the evidence. With what view was the attack made on General Neville's house? Was it it to gratify a spirit of revenge against him, as a private citizen, as an individual? No, as a private citizen, he had been highly respected and beloved; it was only by becoming a public officer, that he became obnoxious; and it was on account of his holding the excise office alone, that his house had been assailed, and his person endangered. On the first day of attack, the insurgents were repulsed; but they rallied, returned with greater force, and fatally succeeded in the second attempt. They were arrayed in a military manner; they affected the military forms of negotiation by a flag; they pretended no personal hostility to General Neville; but they insisted on the surrender of his commission. Can there be a doubt, then, that the object of the insurrection was of a general and public nature?

The second question to be considered is, how far was the prisoner traitorously connected with the insurgents? It is proved by four witnesses, that he was at Couche's Fort, at a great distance from his own home, and that he was armed. One *witness proves, positively, that he was at the burning of Gen. Neville's house; and another says, "it runs in his head, that [*356 he also saw the prisoner there." On this state of the facts, a difficulty has been suggested. It is said, that no act of treason was committed at Couche's Fort; and that however treasonable the proceedings at Gen. Neville's may have been, there are not two witnesses who prove that the prisoner was there. Of the *overt* act of treason, there must, undoubtedly, be proof by two witnesses; and it is equally clear, that the intention and the act, the will and the deed, must concur; for a bare conspiracy is not treason. But let us consider the prisoner's conduct, in a regular and connected course. He is proved by a competent number of witnesses, to have been at Couche's Fort. At Couche's Fort, the conspiracy was formed, for attacking Gen. Neville's house; and the prisoner was actually passed on the march thither. Now, in Foster 213, the very act of marching is considered as carrying the traitorous intention into effect; and the jury (who will sometimes find the most positive testi-

mony contradicted by circumstances which carry irresistible conviction to the mind) will consider how far this aids the doubtful language of the second witness, even as to the fact of the prisoner's being at Gen. Neville's house.

On the personal motives and conduct of the prisoner, it would be superfluous to make a particular commentary. He was armed, he was a volunteer, he was a party to the various consultations of the insurgents; and in every scene of the insurrection, from the assembly at Couche's Fort to the day prescribed for submission to the government, he makes a conspicuous appearance. His attendance, armed, at Braddock's field, would of itself amount to treason, if his design was treasonable.

Upon the whole, whether the conspiracy at Couche's Fort may of itself be deemed treason; or, the conspiracy there, and the proceedings at Gen. Neville's house, are considered as one act (which is, perhaps, the true light to view the subject in), the prisoner must be pronounced guilty. The consequences are not to weigh with the jury: it is their province to do justice; the attribute of mercy is placed by our constitution in other hands.

Verdict, guilty.(*a*)

*357] *Same Cause.

In the course of the trial, the following points were ruled by the court.

I. The attorney of the district proposed to prove, that a circular letter had been written at Canonsburgh, on the 28th of July 1794, by several leaders of the insurrection, calling upon the militia officers, and other citizens, to assemble at Braddock's field, on the 1st of August following, with arms, ammunition and provisions; that the witness had seen the original letter, which was left with him, under instructions to pass it on to another person; and that the copy now produced was conformable, in substance, to the original.

But it was objected, by the counsel for the *prisoner*, that before a copy of the letter could be given in evidence, the loss of the original must be proved; and even then, the witness must be able to attest, that he had compared them, and that the copy offered was in all respects correct.

It was answered, by the *Attorney of the District*, that from the general circulation of the letter, copies must have been multiplied, and during a season of such confusion (to which the common rules of evidence are entirely inapplicable), it is impracticable to trace the comparison of any one copy with the original.

By the Court.—If it can be proved, that the copy of the letter now produced, was one of those copies which were actually circulated at the time of the insurrection, it is admissible evidence: but otherwise, it cannot be read to the jury.

II. The Attorney of the District offered testimony to prove, that, in the course of the insurrection, the prisoner joined in robbing the public mail of

(*a*) The prisoner was pardoned; and the president afterwards granted a general amnesty to all the insurgents, who were not objects of pending prosecutions.

the United States; and that several of the letters, thus intercepted, had been read at the meeting at Braddock's field.

But it was objected, on behalf of the *prisoner*, that the robbery of the mail was a felony, for which, as a substantive and independent crime, he was actually charged by another indictment; and that, therefore, evidence relating to it should not be given on the present issue, as the prisoner was not prepared to answer, and a prejudice might be excited against him in the mind of the jury.

By the Court.—An act committed with a felonious intention, cannot be given in evidence, upon the trial of an indictment for high treason. It does not yet appear, that the mail was intercepted and rifled with a traitorous intention; and so far as it respects the prisoner, there is another indictment against him, charging the offence merely as a felony. Under these circumstances, the testimony cannot be admitted.

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*APRIL TERM, 1796. [*358

Present, Iredell and Peters, Justices.

Hulsecamp v. Teel.

Jurisdiction.

In actions sounding in *tort*, the damages laid in the declaration, are the matter in dispute, and the test of jurisdiction.

This was an action for an assault and battery, committed on the high seas, and the damages were laid in the declaration at $1000; but the controversy being referred, the referees reported only $45 in favor of the plaintiff. In April term 1795, *M. Levy*, for the defendant, obtained a rule to show cause why the report of the referees should not be quashed, and the action dismissed: and the question was now argued by him, on the one side, and by *Rawle*, upon the other.

In support of the rule, *Levy*, having adverted to the 3d article of the constitution of the United States, as the foundation of the judicial authority, contended, that by the 11th section of the judicial act, which establishes the jurisdiction of the circuit court, no suit could be there instituted and maintained, unless the plaintiff was entitled to recover, and actually recovered, a sum exceeding $500, exclusive of costs. He drew a similar inference from the provision in the 12th section of the act, which requires that suits removed into the circuit court from a state court, should be of the same value; and he distinguished between actions for *tort*, and actions upon contract, in order more forcibly to exclude the cognisance of the court in the former, than in the latter instances. The 20th section, empowering the court to adjudge the plaintiff to pay costs, was manifestly designed, in that respect, to give a jurisdiction, which the court would not otherwise possess, on account of the general limitation of jurisdiction as to the sum or matter in dispute: and in the provision, that the district court shall have jurisdic-

tion of offences where the fine does not exceed $100, it is evident, that the jurisdiction cannot be ascertained, until the judge is about to pronounce sentence.

Rawle, in opposing the rule, observed, that the act of congress did not recognise any distinction betweeen actions for *tort*, and actions upon contract; but barely required that the matter in dispute should exceed the sum or value of $500, exclusive of costs; and the language is the same in the 9th section, in *relation to the jurisdiction of the district court in suits *359] brought by the United States. The very provision, indeed, which authorizes the court, in the 20th section, to adjudge that the plaintiff shall pay costs, where less than the sum of $500 is recovered, shows clearly that the jurisdiction was intended to be vested, if the matter in dispute, as stated in the declaration, exceeds the specified amount, though a jury or referees should not give so much. The matter in dispute in this cause was an aggravated personal injury, which might have endangered the plaintiff's life, and certainly would have justified heavier damages.

The Judges, though they delivered their opinions separately, concurred in the following positions, as the ground of decision.

By the Court.—That the sum or value of the object in controversy should amount to $500, was deemed by the legislature a reasonable limit to the jurisdiction of this court: but the law itself likewise provided the remedy against any transgression of that limitation, by declaring that the plaintiff, who recovers less may be adjudged to pay costs. The very force of the expression vests a jurisdiction; since it would be impossible to adjudge that the plaintiff should pay costs, without taking cognisance of the cause.

But whatever distinction might be made, in other respects, between suits instituted to recover a sum certain, and suits brought to recover damages for a *tort*, certain it is, that in the latter cases, there can be no rule to ascertain the jurisdiction of the court, but the value laid in the declaration. If the finding of the jury was the criterion, then the jurisdiction of the court would depend entirely on the verdict; and if a verdict in favor of the plaintiff, for less than $500, would defeat the jurisdiction, a verdict against him must unquestionably be equally fatal.

We think, therefore, that the amount of the plaintiff's claim must be considered as the matter in dispute; and that upon a fair comparison and construction of the 11th and 20th sections of the judicial act, the mere finding of a jury, or of referees, upon the question of damages, cannot affect the jurisdiction of the court.(*a*)

Rule discharged.

(*a*) The following authorities were cited by Peters, Justice:—Debt, detinue, &c., will not lie for a debt under forty shillings; 2 Inst. 311, 312. Com. Dig. Yet, the smallness of the sum must appear on the face of the declaration, 3 Burr. 1592; Barnes 497, and though reduced by a set-off, it will not affect the jurisdiction of the court. 3 Wils. 48; Com. Dig. 590.

In Wilson, plaintiff in error, *v.* Daniel, in the supreme court of the United States, at August term 1798 (in the absence of Wilson, Justice), the Court adjudged, that the verdict or judgment was not to be regarded as the rule for fixing the value of the matter in dispute, on a question of jurisdiction: and that the demand of the plaintiff, that is, the value of the thing put in demand, is to be considered; unless the law itself

*OCTOBER TERM, 1796.

Present, WILSON and PETERS, Justices.

SCHERMERHORN *v.* L'ESPENASSE *et al.*

Injunction.

An injunction may issue, without affidavit, if other sufficient evidence be produced.
An injunction will not be dissolved, by reason of delay in bringing the cause on for hearing, which appears to have arisen from inadvertence and mistake—there being no evidence of wilful procrastination.

BILL IN EQUITY. This bill stated, that on the 31st of December 1790, the defendants, merchants of Amsterdam, had executed to the complainant (who resided at the same place) a power of attorney, to receive to his own use, the interest due on $180,000 of certificates of the United States, bearing interest at six per cent. from the 1st of January 1788, to the 31st December 1790, amounting to $32,400; but that, notwithstanding this assignment, the defendants, on the 16th June 1792, received certificates for the $32,400 of interest, and agreeable to the act of congress, funded the amount at three per cent. in their *own names. The bill then prayed relief, according to the equity of the case, and that an injunction might issue [*361 to prevent the defendants from transfering the stock, or receiving the principal or interest; and also to prevent the register and transfer clerk of the treasury, and the cashier of the Bank of the United States, from allowing a transfer, or paying the principal or interest of the stock, pending the suit.

On filing the bill, *Du Ponceau* exhibited to the court the power of attorney, duly authenticated, from the defendants to the complainants, and his own affidavit, stating that he had inspected the books of the treasury, where he saw that the identical stock in question was registered in the names of the defendants. Under these circumstances, the injunction issued; but no *subpœna* was ever taken out, nor any further proceedings had in the suit, until the present term, when *Lewis* moved for a rule to show cause why

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makes the rule, as in an action of debt on a bond (in which only the penalty and interest can be recovered), when that rule is to be pursued, whatever may be the damages laid in the declaration.[1]

IREDELL, Justice, agreed in the opinion of the court, as it applied to the original suit in the inferior court: but he dissented from its application to the case of a writ of error, when the sum rendered by the judgment was, in his opinion, to be deemed the value of the matter in dispute, in the supreme court.

CHASE, Justice, agreed in the decision of the court, because the legal judgment (of which alone the court could take notice) was for the penalty of the bond, on which the action had been brought; though, in an irregular manner, the record says, that judgment was to be released, upon payment of a smaller sum, than would authorise the party to bring a writ of error. He thought that, to ascertain the value of the matter in dispute, the court must always refer to the original suit; but he would not admit, that the demand of the plaintiff furnished the rule, as the plaintiff might, on that ground, entitle himself, in every case, to a writ of error, by laying his damages proportionally high.

[1] 3 Dall. 401.

the injunction shonld not be dissolved. Before the motion was argued, *Du Ponceau* filed another affidavit, stating that the delay in issuing process was by mistake and accident, and not from motives of malice and oppression; that he had heard that *Lewis* was to make the present motion, near a year ago; and that in expectation it would be made, he had suspended the proceedings on the part of the complainant, intending, as soon as *Lewis* should appear in the cause, to serve him with the process, as clerk in court. *Lewis* admitted, that he had been applied to, about a year ago, not on behalf of the defendants, but of Messrs. Pollocks, who claimed the stock (as he alleged), by virtue of a deposit from the complainant himself; but he insisted that he had postponed making his application to the court, one term, at the instance of *Du Ponceau*. These facts being understood—

Lewis endeavored to support his motion on two grounds: 1st. That the injunction had issued irregularly, as there was no affidavit made of the truth of the allegations contained in the bill: and 2d. That the complainant had unreasonably delayed bringing the cause to a hearing and decision.

On the first ground, he observed, that he did not object, because the injunction had issued before a *subpœna* was served, as there were various cases in which justice could not otherwise be attained; but in no case can an injunction be issued or awarded, without a previous affidavit of the truth of the facts stated in the bill. 2 Harr. Pr. Ch. 221, 222, 223, 232, 245, 259; 1 Brown Rep. Ch. 452; 3 Ibid, 12, 24, 463. The affidavit filed in this case is not in support of the bill, but in proof of an extrinsic, immaterial fact; and the power of attorney was not of itself sufficient. Such powers, given in a foreign country, do not always, on their face, explain the meaning of the parties; nor can they be deemed competent evidence of the right of property. It is true, that Harr. P. Ch. 221, and Hinde 583, mention that an injunction *may issue on the exhibit of deeds, writings or other evi- *362] dence; but the former cites Vernon, where not a word is said on the subject, and the latter refers to no authority.

On the second ground, it was urged, that the complainant's delaying his suit is assigned in all the books of practice as a good reason for dissolving an injunction. 2 Harr. Pr. Ch. 259, 16, 17; Prec. in Ch. 508. In this case, there has never been even an attempt to serve a *subpœna*, and the property being within the jurisdiction of the court, the defendants (who are not, however, proved by affidavit to be resident abroad) might have been *subpœnaed*, even in Amsterdam. If a *subpœna* is not served, the only excuse which can be allowed, and which must be proved, is that the party cannot be found—but the attempt to find must be made.

Du Ponceau and *Dallas*, for the complainant, premised, that they were desirous in any mode to obtain a hearing and decision on the merits of the cause; and offered to meet the adverse counsel *instanter*, either on the claim of the defendants, or of the parties for whom he interposed, upon an answer to the present bill, upon a cross-bill, or upon a bill of interpleader. If this overture was rejected, the inference must be conclusive in favor of the complainant, and the court will pay no regard to a motion made in behalf of persons, whose interests are not involved in the existing cause, and who preferring this insidious course, refuse to appear, for the purpose of enabling the complainant to contest their pretensions.

But in answer to the two grounds urged for dissolving the injunction, it was contended: 1st. That, although an affidavit of the truth of the facts contained in the bill, is a regular, and perhaps, the most general foundation for an injunction, is not the only foundation on which it issues. Where the bill states an equity, depending on the discovery of the defendant; or a relief is prayed upon circumstances happening within the knowledge of the complainant, and several other analogous cases, the affidavit of the party is the best evidence of which the subject admits; but a court of equity will not, any more than a court of law, confine itself to one kind of proof, where there are various kinds of equal validity; much less will it adopt an inferior, in exclusion of a higher kind. Suppose, the fact depends on a record; the law says, that a record is the only regular proof of its own existence; and yet, if the rule in chancery is as inflexible as it is stated to be, the necessity for the affidavit of the interested party cannot be superseded by exhibiting the record itself. In the present case, would the complainant's affidavit be more satisfactory to prove the contents of the power of attorney, than the inspection of the instrument itself, as an exhibit in the cause? But it is not on general principles alone, that the regularity of the proceeding is *maintained: all the books of practice concur in stating, that an injunction may be obtained either upon matter confessed in the answer, [*363 or upon some matter of record, or on some deed, writing or other evidence, produced in court. 2 Harr. Pr. Ch. 221; Hinde Pr. Ch. 583. It issues upon payment of money into court; and it has been granted to a bankrupt, upon the bare production of his certificate, to stay proceedings at law. 2 Harr. Pr. Ch. 222, 223. Besides, the present bill must, from the nature of the transaction, be filed by an attorney, as the complainant lives abroad; and it would have been fatal, to wait for an affidavit, as the stock would certainly have been transferred, on the first intimation of the suit, or intention to sue. It is conclusive, however, that by proof, independent of the allegations in the bill, to wit, the defendant's assignment of the property in question to the complainant's use, and *Du Ponceau's* affidavit of the defendant's having afterwards converted it to his own use, there is an apparent spoliation and fraud. The conscience of the court cannot be more satisfactorily informed upon the subject; and it is a strong additional circumstance, that notwithstanding the injunction has so long bound the property, the defendants have never attempted to release it.

2d. This naturally leads to the second consideration, whether the delay has been so unreasonable, as to warrant the court in dissolving the injunction; and of course, putting it for ever out of their power to do justice to the party really injured, as the stock will, doubtless, be instantaneously transferred. Neither of the grounds of the present motion at all relate to the merits; and it may fairly be remarked, that the delay might more easily have been prevented by the defendants, than by the complainant. The delay, however, has not proceeded from any intention to oppress the defendants, nor to avoid a discussion; it is, at most, an error, or *laches* of the solicitor, which the court will not allow to be converted into an instrument for the destruction of a just claim. The defendants being abroad, it was doubtful how the complainant could proceed to bring the suit to a decision; Mitford 30; 2 Harr. Pr. Ch. 222; and where an injunction is granted on the merits, it will not be dissolved, before a hearing. If, therefore, the merits

are with the complainant, no advantage can flow from granting the present motion; as it is expressly laid down in the books, that where the equity appears evidently for the plaintiff, or his case is hard, an injunction dissolved for unreasonable delay, will, upon motion, be revived. 2 Harr. Pr. Ch. 224. The court will not dissolve the injunction merely to give an opportunity to carry the property (which ought in equity to be deemed the complainant's) out of its jurisdiction.

PETERS, Justice.—If this were not a case, in which an irreparable injury *364] might be done, by allowing the stock to be placed *beyond the jurisdiction of the court, it would, perhaps, be proper to insist upon a more rigid practice then has been pursued. But the dissolution of the injunction would, probably, put the property out of the power of the court; and incapacitate us from doing justice hereafter to the parties, according to the real merits of their respective pretensions. It is proper, however, to observe, that I do not think an affidavit to the contents of a bill, is the only foundation for issuing an injunction. Harrison, on this point, is himself a respectable authority, although he cites no other book; but independently of all written authorities, reason and the dictates of justice require, that other proof besides the party's oath should be allowed. Nor, under all the circumstances, can I decide, that the delay which has occurred is without a reasonable excuse. It will be proper, however, in continuing the injunction, to apprise the complainant, that, unless some good cause to the contrary is shown, I shall be for dissolving it, at the next term.

WILSON, Justice.—This motion is made on two grounds: 1st. That the injunction originally issued on an improper foundation: and 2d. That there has been an unreasonable delay in bringing the suit to a decision under it. It does not appear to me, however, that either of these grounds is sufficiently supported. The irregularity rests solely on the want of an affidavit; but this, though it is frequently, and perhaps, generally, the mode of proceeding, is not, in my opinion, the only one. In the very case now before the court, the evidence of the power of attorney, operating effectually as a transfer of the property, is certainly stronger evidence than an affidavit of the interested party. With respect to the delay, it is sworn to have happened through inadvertence and mistake; and no evidence of a wilful procrastination has appeared in the course of the discussion. On the contrary, an overture has been made to bring the merits to a hearing, as expeditiously as can be devised. It is to be considered, likewise, that if the injunction is dissolved, the court put it out of their power to do effectual justice; but, if it is continued, justice can be done, eventually, to the injured party; whether the complainant, the defendant, or Messrs. Pollocks, shall establish a title to the property.

The motion refused.

WHARTON'S executors *v.* LOWREY.

Amendment in equity.

After answer, setting up the statute of limitations, the complainant may amend, by alleging that the frauds charged in the bill came to his knowledge within six years before the commencement of the suit.

BILL IN EQUITY. The bill was filed in October 1793, to open an account, which had been settled and signed by the complainants, in April 1781, touching the transactions *between the testator and the defendant, while commissaries in the American army, during the revolutionary [*365 war. The bill charged the defendant (among other fraudulent practices) with making erasures in the complainant's books; and also set forth a number of specific errors and over-charges in the account. The defendant filed an answer to the bill, in which he denied all fraud, canvassed and refuted the specification of errors and over-charges, and pleaded the statute of limitations.

Rawle and *Lewis*, having obtained a rule to show cause why the bill should not be amended, by inserting, that the frauds charged had come to the complainant's knowledge within *six* years before the commencement of the suit, now moved to make the rule absolute; and cited 1 Har. Ch. 106; 3 P. Wms. 143.

Dallas, for the defendant, admitted that the allowance of amendments was discretionary with the court; but contended, that after a general answer to the allegations, and a denial of the frauds stated in the bill, the complainant ought not to be indulged, without some other proof to support the charge of fraud, than his bare assertion. In the cases cited in 3 P. Wms. 143, there was no answer to the bill, but merely a plea of the statute of limitations; and in the principal case, the chancellor only ordered the defendant to answer, which the present defendant has already done. Twelve years have elapsed since the account was settled; and the fraud being denied on oath, and unsupported by any species of evidence, the complainant ought not to be permitted to harass the defendant, and procrastinate a decision.

BY THE COURT.—Considerations respecting the merits of the cause, ought not to weigh in the determination of the present question. The complainant could not foresee that the statute of limitations would be pleaded; and it is in order to bring before the court an essential fact arising from that plea, that the amendment is proposed.

The rule made absolute.

The Cassius.

Ketland, *qui tam*, *v.* The Cassius.

Jurisdiction.

The circuit courts have no original jurisdiction, in suits for penalties and forfeitures.
The district courts have exclusive original jurisdiction of all suits for penalties and forfeitures, under the laws of the United States.

An information that had been exhibited against the Cassius, as a vessel illegally fitted out within the jurisdiction of the United States,(*a*) came on to be argued, upon a suggestion filed *ex officio* by the attorney of the district, in pursuance of directions from the president, stating, that the vessel was the *366] public *property of the French republic, and therefore, not liable to seizure and forfeiture. But soon after the argument was opened on the merits, a doubt was intimated by the court, whether the circuit court had jurisdiction in this case? And the counsel were requested, in the first instance, to discuss that point.

Lewis, for the informant, contended, that the district court had not, and that this court had, jurisdiction. He referred to the 9th, 11th, 21st and 22d of sections the judicial act; and from comparing these, endeavored to establish his general position. He said, that the 9th section does not give the jurisdiction to the district court; for an information *in rem* is not within the first clause of the section, which gives cognisance of crimes and offences to that court; nor is it within the clause creating an exclusive original cognisance of all civil cases of admiralty and maritime jurisdiction, for this is not a civil case of that description, but a proceeding to enforce a forfeiture for an offence; and it is certainly not included in the clause of seizures under the laws of impost, navigation or trade. With respect to the clause giving the district court, "exclusive original cognisance of all seizures on land, or other waters, &c., and of all suits for penalties and forfeitures incurred under the laws of the United States," it must, in order to preserve consistency in the different parts of the law, be understood to mean exclusive of the state courts, and not of the circuit court. Penalties of a specific sum, recovered by civil suits *in personam*, are here intended to be distinguished from proceedings *in rem*; and in the former, but not in the latter case, a jurisdiction is given to the district court. The accuracy of this construction may likewise be strongly inferred, considering that an appeal is given from the district to the circuit court, in suits *in personam*, but not in suits *in rem*; and therefore, if the opposite doctrine prevailed, the circuit court would be ousted of all jurisdiction, original, as well as appellate. If it should be said, that this seizure is of a vessel exceeding ten tons burden, made on navigable waters, within the district, and that it is consequently embraced by the clause which gives jurisdiction to the district court in the case of seizures; t is enough to answer, that the operation of that clause is confined to seizures under laws of impost, navigation or trade. But the forfeiture is distinct from the seizure; and where a penalty is given, as well as a forfeiture incurred, for the breach of any law (which is the case in the present

(*a*) See United States *v.* Peters, in the supreme court of the United States. (3 Dall. 121.)

instance, and is frequently the case in other instances), a suit for the penalty may be instituted in the district court, and an information to enforce the forfeiture may be filed in the circuit court. Then, the 11th section of the judicial act gives to the circuit court, "exclusive cognisance of all crimes and offences, cognisable *under the authority of the United States, except where the act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognisable therein." Unless, therefore, there is any law giving cognisance to the district court, this section gives it exclusively to the circuit court. But even if the district court has cognisance, either the present cause of forfeiture must be taken out of the denomination of crimes and offences, or by the express words of the act, the circuit court is vested with a concurrent jurisdiction; and the exclusive words can only be rendered operative by restricting them to the state courts. [*367

Rawle (attorney for the district) stated the general opinion and uniform practice to be in favor of the exclusive jurisdiction of the district court; and he contended, that a fair and rational analysis of the law, would admit of no other construction. It has been decided here, as well as in England, that proceedings of this nature are civil suits. Cowp. 391; *United States* v. *La Vengeance*;(a) and the words of the judicial act are so strongly exclusive, in giving jurisdiction to the district court, that they cannot be misunderstood or disregarded. Nor does the contradiction suggested really exist; for, if the obvious distinction between prosecutions against persons for crimes, and proceedings to recover a forfeiture, is adverted to, there will be no inconsistency in referring the concurrent jurisdiction of the circuit court to cases of the former description, while the exclusive original jurisdiction of the district court is asserted, in cases of the latter description.

PETERS, Justice.—The language of the act of congress is so forcible, to vest an exclusive jurisdiction in the district court, that the impression on my mind can never be obviated, but by something equally authoritative, direct and conclusive. The argument which has been opposed to this language, merely consists of slight analogies, doubtful implications and unsatisfactory deductions, from a comparative view of different sections of the law. To take jurisdiction, however, in any case, the court ought to be clearly of opinion, that the constitution and the law intended to give it; but here, the words will hardly admit a doubt upon the intention of the legislature, to exclude the jurisdiction of the circuit court; and therefore, we can have no pretence whatever to sustain the present information.

I have uniformly affixed this construction to the law. In the case of the *United States* v. *Guinet* (*ante*, p. 321), for being concerned in illegally fitting out a French privateer, the party was arrested,* and some cannon and other articles were seized. I, then, upon full consideration, directed that the information *in rem*, to enforce the forfeiture of the cannon, should be instituted in the district court; but I bound the defendant over to the circuit court, to answer personally for the offence. The practice has, I believe, been conformable to this precedent: forfeitures under the excise laws have certainly been sued for, without exception, in the district court, upon the general [*368

(a) 3 Dall. 297. At the request of the court, I produced my notes in this case, on the argument.

jurisdiction given by the judicial act, and not upon any special jurisdiction created for that purpose.

WILSON, Justice.—The court is bound to take notice of a question of jurisdiction, whenever it may occur, and however it may be proposed: for, if we are satisfied, that we have not legal cognisance of any cause—or, in terms less direct, if we are not satisfied, that we have cognisance; we ought not to proceed to a decision, or an investigation, upon its merits.

In the present instance, it is a question of great importance, and perhaps, of some difficulty; but the strong bias of my mind (which increases, indeed, with every moment's reflection upon the subject) is opposed to the alleged jurisdiction of the court. It is supposed by the counsel for the informant, that the jurisdiction is maintainable, on the positive words of the 11th section, and on a fair implication resulting from a view of the 21st and 22d sections of the judicial act: for it is said, if the court has not original jurisdiction, by the 11th section, it can have no jurisdiction at all; since its appellate jurisdiction established by the 21st and 22d sections, is confined to civil causes. But the jurisdiction in the case of crimes and offences, obviously relates to prosecutions against persons; and when viewed in that light, neither the positive words of the 11th section, nor any implication resulting from the 21st and 22d sections, can be applicable to the present cause, which is not described by the former, nor affected by the latter: to take cognisance of a proceeding merely *in rem*, cannot be considered as taking cognisance of a crime or offence.

When, however, we advert to the jurisdiction given to the district court, every shadow of doubt seems to vanish. The 9th section of the act declares that "the district court shall have exclusive original cognisance of all suits for penalties and forfeitures, incurred under the laws of the United States." The exclusion is expressed in strong and unqualified terms; nor can it, by any reasonable interpretation, be restricted to a mere exclusion of the state courts. Wherever, indeed, a qualified exclusion is intended, the expression of the legislature corresponds with that intention. Thus, it is provided, in two different *members of the very same section, that the district *369] court shall have, "exclusively of the courts of the several states," cognisance of all crimes and offences committed upon the high seas, &c., and of suits against consuls and vice-consuls. But if the construction which I have stated is correct, no contradiction exists, to call for any strained exposition of the law. The jurisdiction given to the circuit court, whether exclusive or concurrent, will be supported, by applying it to prosecutions against delinquents, for crimes and offences; and the exclusive jurisdiction given to the district court, will be preserved, by allotting to it all suits for penalties and forfeitures under the laws of the United States. Whether, therefore, this is a suit for a forfeiture, appears, upon the whole, to be the only real object of inquiry. We think, that it is a suit of that denomination; and consequently, cannot take cognisance of it.

But the subject is entitled to the most solemn consideration, and the most authoritative judgment. We shall be happy, therefore, to assist in putting it upon any proper footing, to obtain the opinion of the supreme court. In the meantime—

BY THE COURT.—Let the information be dismissed. (*a*)

(*a*) *Lewis* doubted, whether a writ of error would lie, for want of parties, as the

*APRIL TERM, 1797.

Present, IREDELL and PETERS, Justices.

UNITED STATES *v.* VILLATO.[1]

Treason.—Alienage.

An unnaturalized alien cannot be guilty of treason against the United States.
The naturalization act of Pennsylvania of 1789 was repealed by the adoption of the constitution of 1790.[2]

THE defendant had been committed by the district judge, on a charge of high treason against the United States, and on the return to a *habeas corpus*, issued under the act of Pennsylvania (2 Dall. Laws, 241), it appeared, that he had entered on board of a French privateer, "in parts out of the territory of the United States, and that, having so entered, he aided in capturing an American vessel."

But it was objected, by *Dallas* and *Du Ponceau*, for the prisoner, that he was not liable to a charge of high treason; because he was by birth a Spaniard, and had never become a naturalized citizen of the United States. They contended, therefore, that he ought to be discharged from the prosecution; independently of any inquiry, whether the offence could be deemed high treason, even in a citizen.

The facts were these: Francis Villato was born within the dominions of the King of Spain; he came from New Orleans to Philadelphia, in the beginning of the year 1793, and on the 11th of May following, he took and subscribed, before the mayor of the city, the oath specified in the third section of the act of assembly, passed on the 13th of March 1789 (2 Dall. Laws, 676). He afterwards went to the West Indies, entered on board a French privateer, and acted as prize-master of the American brig John, of New York, while he was on board, and procured to be libelled and condemned at Cape François.

Under these circumstances, the argument entirely turned upon the question—whether the prisoner had become a citizen of the United States, in consequence of the oath taken and subscribed by him, on the 11th of May 1793?

For the affirmative of the proposition, *Lee*, the attorney-general of the United States, and *Morgan*, contended, that the act of Pennsylvania was in force in the year 1793; that it was not affected by the establishment of the new state constitution, nor repealed by any subsequent law; that the power of naturalization *granted to the federal government was concurrent with, and not exclusive of, the state jurisdiction upon the subject; [*371

French republic had refused to file a claim to the vessel; and he said, that he was prepared to contend, that the suggestion filed *ex officio* by the attorney of the district, ought to be dismissed. The next day, he mentioned, that presuming the decision against the jurisdiction of the circuit court, was, in effect, a recognition of the jurisdiction of the district court, he should report to that tribunal, without giving this court (who had deferred pronouncing their decision, in order that he might consider the matter) any further trouble.

[1] s. c. Whart. St. Trials, 185. [2] See note to the case of Collet *v.* Collet, *ante*, p. 294.

that the first naturalization act of congress, passed in the year 1790, furnished a new rule, but contained no repealing or negative words, to impair the operation of the pre-existing state laws; and that although, at this time, there was no other than the federal rule for naturalizing a foreigner, yet this was the direct effect of positive negative words, in the act of congress passed in the year 1795 (1 U. S. Stat. 414); *Collet* v. *Collet, ante*, p. 295.

Dallas, in reply.—It is conceded, that if the prisoner is not a naturalized citizen of the United States, he must be discharged. It is unnecessary to inquire, whether the federal power of naturalization is concurrent or exclusive; since, it will be sufficiently shown, that even if the power is concurrent, the state had ceased to exercise it, before the year 1793; and consequently, the prisoner could not have become a citizen of the United States, under any law of Pennsylvania. Before congress had exercised the power of naturalization given by the federal constitution, the then existing state constitution had declared, that "every foreigner, of good character, who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land or other real estate; and after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural-born subject of this state, except that he shall not be capable of being elected a representative, until after two years' residence." 1 Dall. Laws, app. 60. While the test laws were in force, no particular form of qualification was prescribed for the purpose of naturalization, different from the oath or affirmation of allegiance and abjuration, exacted from every inhabitant of the state. But when the test laws were repealed, and before congress had legislated upon the subject, a special provision became necessary; and the proviso in the act of the year 1789 (2 Dall. Laws, 677) was expressly introduced to preserve and effectuate the 42d section of the constitution, with which it is in language and meaning inseparably connected. The next change in the business of naturalization was the act of congress, passed in the year 1790 (1 U. S. Stat. 103). This act, it is true, does not contain a repeal of the state law, nor any negation of a state power to naturalize; but the arguments *ab inconvenienti* are strong against a concurrent authority; and if not on the question of power, at least, on the principle of expediency, the state convention, who afterwards formed our existing constitution, have evidently avoided a collision of jurisdiction, by omitting to prescribe any state mode of naturalization, and leaving the subject implicitly to *the *372] rules which congress had previously prescribed. A citizen of the United States, adopted under the act of congress, is a citizen of each and every state; and the convention of Pennsylvania could conceive no means of establishing uniformity (the very object contemplated by the federal constitution), if each state, in a distinct and different mode, might likewise convert the character of an alien, into that of a citizen of the United States.

The state constitution is, therefore, silent; and it only remains to be shown, that the law passed in the year 1789, was virtually repealed by the ratification of that constitution; which provides, indeed, that all the pre-existing laws, not inconsistent with itself, shall continue in force. Schedule, § 1. But the act of 1789 was not only entirely dependent on the existence

of the old constitution, which was abrogated; but is in many essential points inconsistent with the new constitution. Thus, it is to be remarked, that the part of the act of assembly on which the controversy turns, is not a substantive and original section, but a mere declaratory proviso, that the legislature did not intend to do, what it was out of their power to have done, that is, to alter the 42d section of the constitution, by a mere repeal of the test laws. The proviso proceeds in the following words: "every such foreigner as in the said section mentioned, who shall come to settle in this state, after one year's residence therein, be entitled to the full enjoyment of the rights and privileges therein specified," upon taking and subscribing the oath, or affirmation, &c. When the whole constitution was destroyed, none of its parts could survive; and when, therefore, the 42d section was annulled, the description of foreigners which it contained, and the rights and privileges which it specified, could no longer furnish a foundation, on which the act of assembly could stand, and it inevitably shared the fate of every baseless superstructure. But is it possible to render the act consistent with the existing constitution? A slight comparison will yield a satisfactory answer. The act declares, that a foreigner, having taken the oath or affirmation of allegiance, and resided here one year, shall be entitled to all the rights and privileges specified in the 42d section of the old constitution; that is, he may acquire, hold and transfer real estate, and enjoy all the rights of a natural-born subject of this state, except the right of being elected a representative, which he cannot enjoy for two years. Now, the existing constitution will not allow any man to be even an elector, who has not resided here two years; and besides requiring a longer period of residence than two years, to entitle a citizen to be elected a representative, a senator or governor, it superadds the qualification, that he shall be of a certain age, before he can be chosen for those offices respectively. If, then, the act of assembly is in force, an alien, naturalized *under it, having the rights of the old, is in a situation preferable to a natural-born citizen under the accumulative restraints of [*373 the new constitution. But a contrary construction has been given whenever the point was directly presented for consideration (which was not the case in *Collet* v. *Collet*), by the legislature, by our courts, and by the bar.

Peters, Justice.—At the time of committing the defendant, some doubts arose in my mind; which, on account of the importance of the subject, I thought it more proper to submit to a solemn discussion, than hastily to decide at my chambers. I take the earliest opportunity, however, to acknowledge, that I am now convinced the commitment was erroneous. The act of assembly is obviously inconsistent with the existing constitution of the state; and therefore, cannot be saved by the general provision of the schedule annexed to it. On that ground only, my opinion is formed; but it is sufficient to authorize a declaration, that the proceeding before the mayor was, *ipso facto*, void; that, the prisoner is not a citizen of the United States; and that, consequently, he must be released from the charge of high treason.

Iredell, Justice.—I am of the same opinion. Difficulties, it is true, have been suggested, on points not necessary to a decision on the present occasion; and certainly, if the question had not previously occurred, I should be disposed to think, that the power of naturalization operated exclusively,

as soon as it was exercised by congress. But the circumstances of the case now before the court, render it unnecessary to inquire into the relative jurisdictions of the state and federal governments. The only act of naturalization suggested, depends upon the existence or non-existence of a law of Pennsylvania; and it is plain, that upon the abolition of the old constitution of the state, the law became inconsistent with the provisions of the new constitution, and of course, ceased to exist, long before the supposed act of naturalization was performed.

The prisoner must, therefore, be discharged.

UNITED STATES *v.* PARKER *et al.*

Process.

An *alias capias* must be tested of the term to which the original was returnable, and be made returnable to the next ensuing term.

A CAPIAS had issued in this cause against Daniel Parker, William Duer and John Holker, returnable to April term 1792; and the marshal then returned, *cepi corpus* as to Duer (who gave special bail in due time), and *non sunt inventi*, as to Parker and Holker. After a declaration was filed (reciting that the marshal had not found two of the defendants within his district, *374] and proceeding against the other alone, upon the principles *of the practice of the courts of Pennsylvania), after issue had been joined, and a variety of continuances, and other entries made upon the record, an original, not an *alias capias* was issued, on the 8th of August 1796, returnable to October term following, against Holker alone, upon which writ he was arrested; but upon a hearing before WILSON, Justice, he was discharged on common bail.(*a*) In October term, the attorney of the district (*Rawle*) had obtained two rules: 1st. That Holker show cause, on the first day of the present term, why the writ issued should not be amended, conformable to the precept, which, it was alleged, directed an *alias capias;* and 2d. That Holker show cause why the plaintiff should not file common bail for him. It was agreed, however, that the case should be argued, as if the last writ had been an *alias capias*, reciting the original *capias* and return; and the only question discussed was—whether an *alias capias* could issue, after the lapse of so many terms, and under the circumstances appearing upon the record, to arrest Holker, and make him a party to the existing suit?

Rawle, for the plaintiff, observed, that upon principles of common justice, and, he thought, upon principles of law too, when there were several defendants, and one only was taken on the first writ, process might issue, from time to time, to bring the others into court, without compelling the plaintiff to discontinue his action. By the 14th section of the judicial act (1 U. S.

(*a*) This action had been originally instituted in the supreme court of Pennsylvania, and Holker (who was then the only person arrested) pressed for a trial; but after an ineffectual opposition to an order for bringing on the case, the attorney of the district entered a discontinuance. On this ground, I am informed, Judge WILSON directed common bail to be accepted from Holker in the second suit.

Stat. 81), it is provided, that the courts of the United States "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." It is only incumbent on the plaintiff, therefore, to show, that the present writ is necessary to the efficient exercise of the court's jurisdiction, and that it is agreeable to the principles and usages of law. It is admitted, that the course of proceeding in England is different. There, the defendant, who is not taken upon the writ, must be pursued to outlawry; and if he does not enter bail, in order to avoid the penal consequences, the plaintiff applies to the exchequer for a sequestration, and obtains payment from the outlaw's effects. 1 Str. 473; 2 W. Bl. 759; 2 Bl. Com. 283. But no mode of *proceeding to outlawry in civil cases, is recognised or prescribed [*375 by any law of the federal or state government; and even in criminal cases, it is questionable, whether the state law could furnish a rule for the United States. Unless, therefore, the mode now pursued shall be sanctioned, endless inconveniences will arise in the administration of justice; for the plaintiff cannot discontinue his action, without certainly losing bail as to one defendant, while he has only a chance of obtaining it from another. If, then, there is a necessity of adopting some process to prevent a right being without a remedy, the present process will be found perfectly consistent with the principles and usages of law; and the informality of the continuances will not be of sufficient moment to attract the attention of the court. Sell. Pr. 400. Such process has been issued repeatedly, both in the supreme court and common pleas of Pennsylvania; though the regularity of it was never, indeed, contested. In England, however, the courts of law and chancery were bound by forms of writ, of almost immemorial antiquity, and always prescribed by the express authority of parliament; until the pressure of business, and the diversity of the cases that arose, produced the statute of Westm. 2, which authorized the clerks in chancery to frame writs *in consimili casu;* and in the exercise of that authority, from time to time, a considerable latitude has been taken. 4 Reeves Hist. E. L. 426; 2 Ibid. 202; 2 Inst. 404, 407; Gilb. C. P. 2, 3, 4; 8 Co. 48. An authority strictly analogous is given to the federal courts by the judicial act; and as there is no common *officina brevium*, it follows, of course, that each court must frame its own writs, according to the nature of the respective cases.

Gibson, *Ingersoll* and *Dallas*, for the defendant, Holker, waived all objection to the mere form of the second *capias;* but insisted, that even an *alias capias* could not issue, unless it was *tested* of the term, to which the original was returned, and made returnable to the next immediately ensuing term.(*a*) They exemplified the mode of proceeding by outlawry in England, on a return of *non est inventus* as to one of several defendants; the force of the issue joined; and the impracticability of making an amendment in the declaration filed, to meet the new case to be brought upon the record, from 1 Str. 473; 1 Wils. 78; 2 Sellon Pr. 389; 5 Com. Dig. 652. One de-

(*a*) IREDELL, Justice.—Is it intended to maintain the writ, on the footing of an *alias*, unless issued to the next term, after the return of the original *capias?*

Rawle.—I think it can be so maintained.

fendant has given bail for the whole amount of the demand; the declaration *376] expressly states, that Holker is not a party to the suit; and an issue *is actually joined by Duer alone. If, therefore, the plaintiff succeeds in the present object, how is the record to be new modelled, upon any principle of law or practice, so as to be rendered consistent with itself, and with the truth of the case? What will be the title of the declaration?—of what term shall it be filed?—what shall be the form of the old, or any new, issue?—and what is to be done with the original writ, and its return? Thus, the perplexity arising from the plaintiff's doctrine (which, if it is just in one case, must be just in every case), is endless and insurmountable. Suppose, the suit originated in the common pleas, but had been removed into the supreme court before the second writ issues—from which court shall the second writ issue, and may one-half of the cause be depending in the court above, and the other half in the court below? Suppose, a verdict given on the first writ, before the second writ is returned—can there be two verdicts for the same cause? how shall the amount be ascertained, or execution issue? and what is to be done, if the verdicts should be contradictory? Suppose, there are ten defendants to one contract, can it be reasonable or just, that there should be ten writs issued, or that ten bail-bonds should be successively taken, for ten times the amount of the demand, or how is the bail to be modified and apportioned? Many other hypotheses might be fairly suggested, to evince the extravagance to which an allowance of the present motion would lead; and even after allowing it, there would arise another difficulty, in ascertaining in what action common bail should be entered for Holker, as there are now clearly two actions for the same cause on the records. See 5 Com. Dig. 297.

But it is not intended to leave the plaintiff without a remedy. If the bail is satisfactory (and satisfactory bail can always be exacted, to the full amount of the demand, upon the arrest of any one of the parties), the plaintiff may proceed to recover judgment, conformable to the state practice. If the plaintiff is not satisfied with the bail, then there may be a discontinuance; or, perhaps, the process may be kept alive, from term to term, until all the parties to the contract are brought into court.

Rawle, in reply.—The consequences ascribed to the doctrine, in support of the motion, owe all their extravagance to the imagination of the opposite counsel. There is an important distinction between usages of law, and the practice of courts—the latter being only a part of the former, and not, of course, as extensive. The question, therefore, should not be referred to the practice of the state courts, but should be decided by the usages of law, under the act of congress; and if it is shown, that the mode of proceeding, now pursued, is not inconsistent with the state practice, while it is agreeable *377] to the usages and *principles of law, it should be sanctioned by the court. The process of outlawry in England is neither a dilatory, nor a precarious remedy; for all the writs may issue at once; the effect, by pronouncing the civil death of the party, cannot be prevented; and the plaintiff is entitled to receive his money from the public treasury out of the sequestered effects of the delinquent. Sell. Pr. Here, however, it would be idle to suspend all proceedings against the defendant who is arrested; since there is no legal process by which the effects of a non-appearing defendant

can be made responsible; and it is uncertain when (if ever) he will come within the jurisdiction of the court. The process of outlawry was devised, principally, to get clear of the return of *non est inventus*, and to show that the plaintiff has done everything in his power to bring all the parties before the court; but it was never intended as an instrument of indulgence and benefit to the arrested defendant.

It is asked, however, in what way the record and the pleadings may be made consistent, on the insertion of Holker's name as a defendant? In the first place, it is to be answered, that whenever bail is entered, it has relation, by a legal retrospect, to the first day of the term, to which the *capias* was returnable; so the court may order Holker's bail to be filed as of April term 1792; and thereupon, grant leave to imparl. As to the declaration, it may be amended to correspond with the fact; and even the case in 3 Wils, 78, shows in what manner this difficulty may be overcome. 1 Sell. Pr. 260, 8. Nor is it important how many defendants enter bail, or for what sum, since the plaintiff can recover no more than the amount of the demand for which the action is brought; and joint defendants may, in any case, give several bail-bonds. The objection to the division and multiplication of suits, will likewise vanish, when it is recollected, that the same effect is produced by the severance of pleas, which may take place (as many precedents in Lilly's Entries establish) in every action against several defendants: a joint issue and a joint judgment are not indispensably requisite; and this court has no superior court, which might involve the inconvenience of a removal of the suit upon the first writ, before the second writ had issued. If, upon the whole, the process is a necessary instrument for the accomplishment of justice, it will be recognised and confirmed by the court, although it is not to be found in the ancient authorities of English law.

The Court, having taken from the 12th to the 16th of April, to advise upon the subject, delivered the following opinions, after a recapitulation of the entries on the record:

Peters, Justice.—There is no controversy on the state of the action, as it respects William Duer, who has given bail for the *full amount demanded by the plaintiff; and it is conceded, that the process used [*378 on the present occasion, could not have been used in England. In that country, the outlawry in a civil case is, perhaps, an adequate remedy for the plaintiff; but it is always optional with the defendant, whether he will submit to the rigor of the proceeding, or enter special bail. In Pennsylvania, likewise, a remedy has been introduced by long usage; the plaintiff being allowed, if he pleases, to proceed, at once, against the defendant who is arrested. And now, as the laws of the United States have prescribed no specific mode for a case of this description, it is proposed, under the authority of the 14th section of the judicial act, that the court shall name, or rather sanction, a new form of writ, which the plaintiff deems adequate to the purpose, and consistent with the principles and usages of law. But I am not a friend to this species of judicial legislation; nor do I think it necessary or proper, to exercise the power of the court, in the present instance; even admitting the existence of the power to the extent contended for. It appears sufficient to my mind, to defeat the present motion, that the *alias* is not tested at the return of the original *capias*, nor made returnable at the next

ensuing term. 5 Com. Dig. 239. There is no principle or usage of law, that will sanction the idea of giving a retrospective teste, so far back as April term 1792, to an *alias capias* issued in August 1796. I am, therefore, clearly of opinion, that, on this ground alone, both the rules must be discharged.

IREDELL, Justice.—I agree, in substance, with the opinion of my brother PETERS. Whatever idea may be entertained of the authority of the court to adopt the practice of Pennsylvania, or to devise a new form of process, upon the principles and usages of law, it does not appear to me, that the plaintiff would be regularly entitled, under the present circumstances, to the benefit of either proceeding: for there is no effectual mode of issuing an *alias capias*, but by testing it of the term to which the original writ was returned.

The practice of Pennsylvania may be reasonable; and its antiquity, at least, would certainly entitle it to respect; but that practice goes no further, than to give to the plaintiff an option, either to suspend his proceedings until the non-appearing defendant can be arrested, or to waive, on filing a declaration, all chance against him, and enforce the suit only against the defendant who is taken on the *capias*. In the present instance, it may have been expedient to adopt the latter course of the alternative, on account of Mr. Holker's permanent residence in another state; but being adopted, the plaintiff is bound by it, and cannot, even on the principles of the Pennsylvania practice, avail *himself of Mr. Holker's casual visit to Philadelphia, without discontinuing the first action. What, indeed, would be the condition of the defendant, who is arrested, if a different construction were to prevail? He might be ready for trial; he might be able to prove that there was no cause of action; he might be desirous to avoid trouble and expense, by a prompt confession of judgment; or he might be the principal, and the non-appearing defendant merely a surety, so that he could derive no advantage from the arrest of his colleague; and yet he would be exposed to an indefinite term of imprisonment, or be held, with his bail, for an indefinite period in suspense, at the pleasure of a plaintiff, who should choose to calculate upon any remote possibility of bringing all the defendants into court. The injustice and oppression to the defendant, furnishes a strong argument against the allowance of such a privilege to the plaintiff.

*379]

It is conceded, however, by the plaintiff's counsel, that the motion would be irregular, unless leave is given to file common bail for Mr. Holker, as of April term 1792, when the original action was instituted. But why should such a retrospect be allowed? Mr. Holker was not then arrested; and shall the court countenance a mere fiction—a fiction not indispensable to justice, unknown in the law, and directly adverse to the truth of the case, exhibited for a number of years upon the record? No, I am an enemy to every species of fictions. The fictions which have been incorporated into the law by long usage (and I believe, the cases of ejectment and common recovery afford the only fictions recognised in America) must be sustained; but so far as I can prevent the introduction of novelties of this nature, I shall be assiduous to do so. All the entries upon the record were true and regular, at the time of making them. There is, therefore, no error to amend; but the court is asked,

for the convenience of the United States, arbitrarily to abolish the writ and its return, the declaration, the issue and the continuances; and not only to undo all that has been previously done, but by an entry of common bail, to engraft, in effect, this falsehood upon the record, that Mr. Holker was arrested in April 1792.

But after all, I will not anticipate an opinion, upon a case, in which an *alias* shall be regularly taken out, and continued from term to term; though my present impressions are unfavorable, even on that ground, to the plaintiff's doctrine. The multiplication of suits, the perplexity of entries, and the oppressive vexation of successive bail-bonds, each for the full amount of the demand, are effects that could not be easily tolerated in the administration of justice. I have not heard, during the discussion, of any principle or usage of law, that would reconcile them to my mind: but this is not the foundation of the present decision; for, the irregularity in the teste and return *of the *alias capias* is a sufficient reason to reject the plaintiff's motion. [*380

The rules discharged.(*a*)

HANCOCK, administrator, *v.* HILLYERS.

Assessment of damages.

On a judgment, by agreement, "for what may be due," in an action upon a promissory note, the plaintiff cannot issue execution, until the damages are assessed.[1]

THE defendant had given a promissory note to the plaintiff, for a specific sum, on which, in different modes, there had been several partial payments. Before any settlement of accounts, however, the defendant entered into an agreement, that judgment should be entered against him by an attorney, "for the amount that may be due." In pursuance of this agreement, judgment was confessed, generally, on the 12th of March 1796; and on the 14th of May following, without any previous trial, writ of inquiry, or notice to the defendant, a *fi. fa.* was issued and levied, for the full amount of the promissory note.

(*a*) The cause (which was *indebitatus assumpsit*) came on for trial before CHASE and PETERS, Justices, at April term 1798, when, after the opening was commenced by *Rawle*, for the plaintiff, it was discovered, that the plea of "*non assumpsit*" was entered in short, and that the statute of limitations had also been pleaded; though the jury were only sworn to try the *issue*, and not the *issues*, joined between the parties.

CHASE, Justice.—The whole proceeding is to my mind unintelligible and irregular. There is only one of the parties to the contract, and only one of the defendants named in the writ, before the court; and no process of outlawry has been prosecuted against the others: how shall we proceed to give judgment? Again, to what is the plea of *non assumpsit* to be applied? Is it, that the appearing defendant did not assume himself, or that he did not jointly assume with the other defendants? And how comes the plea of the statute of limitations to be added, without the leave of the court? But the counsel will have time to reflect upon these difficulties. For the jury are not sworn even in this irregular state of the record, to try the issues between the parties; and therefore the court, on its own authority, will direct the juror last qualified to be withdrawn.

A juror was, accordingly, withdrawn, and the action continued until the next term

[1] See Weikel *v.* Long, 55 Penn. St. 238.

Thomas, thereupon, obtained a rule to show cause why the defendant should not be allowed a set-off for the amount of his payments, and that, in the meantime, proceedings on the execution be stayed.

The rule was afterwards opposed by *Lee*, the attorney-general, who contended, that the regular relief was by application to the equity side of the court, for an injunction; which *would only be granted, upon the *381] defendant's bringing the money into court, or giving security to pay the balance.

But it was answered, by *Rawle* and *Thomas*, that the amount due must be ascertained, before any use could be made of the agreement to enter judgment. It was the express stipulation of the parties; and as the judgment has been improperly entered at common law, it is on the same side of the court that relief should be sought. The courts in England and in Pennsylvania are in the constant practice of staying the proceedings on executions, which are issued either for more than is due, or before the day of payment. See 1 Bac. Abr. 195.

By the Court.—The agreement is to enter judgment *for what may be due*. The plaintiff has no right to decide the question. It is evident, from the terms of the agreement, that there was something to settle; and the plaintiff, either by arbitration, or by a jury, should have proceeded to make the settlement, with notice to the defendant, before he entered the judgment; or, at least, before he issued the execution.

The rule made absolute.

Maxwell's Lessee v. Levy.[1]

Jurisdiction.

A deed colorably executed, for the purpose of giving jurisdiction to the circuit court, will not sustain the jurisdiction.[2]

Ejectment. On a rule to show cause, why this ejectment, and many other cases depending on the same principle, should not be stricken off the record, upon a suggestion that the court had no jurisdiction, it appeared, that the lessor of the plaintiff was a citizen of Maryland, resident there, and that the defendant was a citizen of Pennsylvania, resident here. But as soon as the ejectment was instituted, a bill for discovery was filed against the lessor of the plaintiff, on the equity side of the court, in which it was alleged, "that the conveyance of the premises in controversy to the lessor of the plaintiff, was made by Morris, a citizen of Pennsylvania, for no other purpose than to give jurisdiction to the circuit court;" and the answer to the bill admitted, "that the lessor of the plaintiff had given no consideration for the conveyance; that his name had been used by way only of accommodation to Morris;" but it was not directly said, that it was for the purpose of creating a jurisdiction in the federal court.

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[1] s. c. 4 Dall. 330, where it is more fully reported.

[2] Smith *v.* Kernochen, 7 How. 198; Jones *v.* League, 18 Id.; Barney *v.* Baltimore, 6 Wall. 280; Hurst *v.* McNeil, 1 W. C. C. 70; Starling *v.* Hawks, 5 McLean 318. The opinion of Mr. Justice Story to the contrary, in Briggs *v.* French, 1 Sumn. 251, is not law. But see Newby *v.* Oregon Central Railway Co., 1 Sawyer 63.

After argument, by *M. Levy*, for the plaintiff, and by *W. Tilghman*, for the defendant, IREDELL, Justice, delivered the opinion of the court, in which the conveyance to the lessor of the plaintiff was considered as entirely colorable and collusive; and therefore, incapable of laying a foundation for the jurisdiction of the court.

The rule made absolute.

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*ANONYMOUS *382

Special jury.—Tales.

A *tales* may be awarded, in a case marked for trial by special jury.

IN a cause marked for trial by special jury, nine jurors only appeared; and the question arose, whether the court (who wished to consider it with a view to establish a precedent) could award a *tales*, on the application of the plaintiff.

Levy and *Ingersoll* suggested, that the supreme court of Pennsylvania had so construed the 12th section of the act of assembly (2 Dall. Laws, 265) as to exercise the power of ordering a *tales* in the case of special, as well as of common juries, whenever the plaintiff required it; and also whenever the defendant required it, if he had a rule for trial by proviso.[1] The same power is exercised in England on general principles. Sell. Pr. 476.

Lewis observed, that the supreme court held, that the Pennsylvania act, and not the English practice, must regulate the proceedings with respect to juries; and the case of a *tales*, in trials by special jury, though admissible at common law, might not have been adopted by the legislature, on account of the inconveniences which the practice tended to introduce. But whatever may have been the previous law, the legislative rule must be pursued; and *expressio unius est exclusio alterius.*

Rawle conceived, that the 29th section of the judicial act (1 U. S. Stat. 88) settled the question. In the first part of the section, the provision for impanelling juries is general, obviously including both special and common juries; and as there is the same generality of expression in the latter part of the section, when provision is made for returning a *tales*, it ought also, by a parity of construction, to be extended to both cases.

PETERS, Justice.—I have no doubt of the power of the court to order a *tales* in special jury causes. It might have been done, I think, under the act of assembly; but unquestionably, it may be done under the act of congress. There ought, however, to be such a discretion in using it, as to prevent any injury to either party; and therefore, a trial should not be forced on, without a reasonable delay to bring in the jurors that had been regularly selected.

IREDELL, Justice.—The act of congress seems to remove every difficulty. It makes no distinction (and the court can, therefore, make none) between the case of a special and of a common jury. If this provision had not existed, the subject would have occasioned much doubt in my mind.

[1] Hubley v. White, 2 Yeates 133.

*Symes's Lessee v. Irvine.

Continuance.

It is not ground for forcing on a trial, in the absence of a material witness, that his deposition *de bene esse* might have been taken, under the statute.

The defendant's counsel moved to put off the trial of this cause (which was marked for the 20th of April), upon an affidavit setting forth, "that A. B. a material witness, who lived at Carlisle, in Pennsylvania (at a distance of more than one hundred miles from Philadelphia), was absent; and that he had been sick some time ago, but had promised the defendant to attend at the trial."

Lee, *Ingersoll* and *Rawle* objected to the postponement, because it was in the defendant's power, by virtue of the act of congress (1 U. S. Stat. 88, § 30), to have taken the deposition of the witness *de bene esse*. Nor is it sufficient in every case to make a formal affidavit; the court will inquire so far into the testimony which the witness could give, as to satisfy themselves, that the reason assigned for a postponement is not merely colorable; and if the facts, in the present instance, are material, there can be no injury from allowing the court to hear and decide on them. There can be less occasion, likewise, for indulging such motions in ejectments, than other suits, as the judgment is not conclusive.

E. Tilghman and *Lewis*, in support of the motion, stated, that the cause had never yet been put off, at the request of the defendant; and they urged the superior importance of *vivâ voce* testimony, as a sufficient reason for declining to take the deposition of the witness *de bene esse*, under the act of congress; whose provisions, in this respect, indeed, they regarded as abhorrent to the principles of natural justice.

Peters, Justice.—If any delay had heretofore occurred by the defendant's conduct, I should have been disposed to have held him strictly to the performance of everything, by which it was in his power to procure the testimony of the witness. The act of congress, however, appears to be rather harsh; and if no excuse, like the present, could be admitted, it would be declaring, in effect, that whenever witnesses resided more than one hundred miles from the court, their depositions must be, indispensably, taken.

Iredell, Justice.—It is not a sufficient reason for forcing this cause to a trial, in the absence of a material witness, that the act of congress authorized his deposition to be taken. Courts of justice have always been desirous to obtain *vivâ voce* testimony, where it was practicable; and even the plaintiff himself has given a proof of his sense of its superior estimation, by bringing his witnesses for this very trial from Richmond, in Virginia, though he was equally entitled to take their depositions. *The testimony may be of *384] such a nature as not to admit of all its force being reduced to the form of a deposition.

With respect to a disclosure of the facts, which depend on the testimony of the witness, we think, that it is not regularly in our power to compel it;

and even if we had the power, it might be essentially wrong, in many cases, to exercise it.

Nor do I think that, because this is a case of ejectment, the court should be less scrupulous in ordering the trial to proceed: for, it must be recollected, that the defendant is, at present, in possession of the premises, but will be evicted, if the cause is decided against him.

Upon the whole, the court cannot, perhaps, lay down a general rule for the continuance of causes; but must, under the circumstances of each case, take care that injustice is not done, either by precipitate trials or wanton delays. In the present instance, there appears to be a fair ground for the postponement; and therefore—

Let the cause be continued.

APRIL TERM, 1798.

Present, Chase and Peters, Justices.

United States v. Worrall.

Jurisdiction.—Divided court.

On the trial of an indictment for attempting to bribe a public officer, it is sufficient to sustain the jurisdiction, that the letter offering the bribe was mailed at a post-office within the jurisdiction.

The federal courts have no common-law jurisdiction in criminal cases.[1] Chase, J.; Peters, J., dissenting.

If the defendant in an indictment be found guilty, on the trial, and the court be divided on the question of jurisdiction, sentence will be passed.

The defendant was charged with an attempt to bribe Tench Coxe, the commissioner of the revenue; and the indictment, containing two counts, set forth the case as follows:

"The grand inquest of the United States of America, for the Pennsylvania district, upon their respective oaths and affirmations, do present: That whereas, on the 13th day of May 1794, it was enacted by the senate and house of representatives of the United States of America, in congress assembled,[2] 'that as soon as the jurisdiction of so much of the headland of

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[1] This proposition appears to be supported by the weight of authority, though there are cases in which the opposite doctrine is held. See United States v. Hudson, 7 Cr. 32; United States v. Coolidge, 1 Wheat. 415; s. c. 1 Gall. 488; Pennsylvania v. Wheeling and Belmont Bridge Co., 13 How. 519; United States v. Reese, 92 U. S. 216; United States v. Clark, 1 Gall. 497; United States v. Wilson, 3 Bl. C. C. 435; United States v. Barney, 5 Id. 294; United States v. Ramsay, Hempst. 481; In re Bergen, 2 Hughes 516–17; United States v. Hutchinson, 4 Clark (Pa.) 211; United States v. Hare, 2 Wheeler C. C. 300; United States v. Mackensie, 1 N. Y. Leg. Obs. 374. The cases holding the contrary doctrine are, United States v. McGill, 4 Dall 429; United States v. Henfield, Whart. St. Trials 85; United States v. Willing, Id. 652; United States v. Smith, 6 Dean, Abr. 718. United States v. Meyer, Whart. Prec. § 955, n.; Serg. Const. Law, 272. Nothing can be punished under the laws of the United States, which is not made criminal by statute. United States v. Libby, 1 W. & M. 222; United States v. New Bedford Bridge, Id. 401; United States v. Lancaster, 2 McLean 431. The question, therefore, may be considered at rest, on authority, though never *directly* passed upon by the supreme court.

[2] Act 13th May 1794, 1 U. S. Stat. 368.

Cape Hatteras, in the state of North Carolina, as the president of the United States shall deem sufficient and most proper for the convenience *and *385] accommodation of a light-house, shall have been ceded to the United States, it shall be the duty of the secretary of the treasury to provide, by contract, which shall be approved by the president of the United States, for building a light-house thereon of the first rate:' and also, 'that the secretary of the treasury be authorized to provide, by contract, which shall be approved by the president of the United States, for building on an island in the harbor of Occacock, called Shell Castle, a lighted beacon of a wooden frame, fifty-five feet high, to be twenty-two feet at the base, and to be reduced gradually to twelve feet at the top, exclusively of the lantern, which shall be made to contain one large lamp with four wicks, and for furnishing the same with all necessary supplies:' provided, that 'no such lighted beacon shall be erected, until the cession of a sufficient quantity of land on the said island shall be made to the United States, by the consent of the legislature of the state of North Carolina:' And whereas, the legislature of the state of North Carolina did, on the 17th day of July 1794, cede to the United States the jurisdiction of so much of the headland of Cape Hatteras, in the same state, as the president of the said United States deemed sufficient and most proper for the convenience and accommodation of a light-house, and also a sufficient quantity of land for building on the said island, in the harbor of Occacock, called Shell Castle, a beacon of the kind, description and dimensions aforesaid: And whereas, afterwards, to wit, on the 28th day of September 1797, at the district aforesaid, Tench Coxe, Esq. (he, the said Tench Coxe, then and there, being commissioner of the revenue, in the department of the secretary of the treasury), then and there, was appointed and instructed by the secretary of the treasury, by and with the authority of the president of the said United States, to receive proposals for building the light-house aforesaid, and beacon aforesaid: Robert Worrall, late of the same district, yeoman, being an ill-disposed person, and wickedly contriving and intending to bribe and seduce the said Tench Coxe, so being commissioner of the revenue, from the performance of the trust and duty so in him reposed, on the said 28th day of September 1797, at the district aforesaid, and within the jurisdiction of this court, wickedly, advisedly and corruptly, did compose, write, utter and publish, and cause to be delivered to the said Tench Coxe, in the words and figures following, that is to say:

"'Dear Sir—Having had the honor of waiting on you, at different times, on the light-house business, and having delivered a fair, honest estimate, I will be candid to declare, that with my diligent *and industrious *386] attendance, and sometimes taking an active part in the work, and receiving a reasonable wages for attending the same, I will be bold to say, that when the work is completed in the most masterly manner, the job will clear, at the finishing, the sum of 1000*l*. Now, if your goodness will consider that the same set of men that will be wanted for a small part of one job will be necessary for the other, and particularly the carpenters, and smith for the iron-work, and as they will want a blacksmith's shop and a set of tools at Cape Hatteras, the other iron-work might be made there, and sent across the sound, at a small expense, which would make a considerable saving. I have had, this morning, a set of good carpenters, four in number, as ever emigrated from the old country, as also several stone-masons, offer

ing themselves to go to Carolina. As I told you about the smith that I had engaged, he informed me, that he had a set of good second-hand tools offered him that might be purchased at a reasonable price—therefore, good sir, as having always been brought up in a life of industry, should be happy in serving you in the executing this job, and always content with a reasonable profit; therefore, every reasonable person would say, that 1400*l.* was not unreasonable, in the two jobs. If I should be so happy in your recommendation of this work, I should think myself very ungrateful, if I did not offer you one-half of the profits as above stated, and would deposit in your hand, at receiving the first payment, 350*l.*, and the other 350*l.*, at the last payment, when the work is finished and completed. I hope you will not think me troublesome, in asking for a line on the business, by your next return, and will call for it at the post-office, or in Third street. In the meantime, I shall subscribe myself to be, your obedient and very humble serv't to command, Robert Worrall.

"'Philadelphia, Sept. 28, 1797.
No. 26 North Third street.'

"Which letter was directed in manner following, that is to say: 'For Tench Coxe, Esq., Burlington, near Bristol, Pennsylvania.'

"To the evil example of others in the like case offending, and against the peace and dignity of the said United States.

"And the grand inquest aforesaid, upon their respective oaths and affirmations, do further present, that Robert Worrall, late of the same district, yeoman, being an ill-disposed person, on the 28th day of September, in the year aforesaid, in the district aforesaid, and within the jurisdiction of this court, wickedly, advisedly and corruptly, did solicit, urge and endeavor to *procure Tench Coxe, Esq., he the said Tench Coxe, then and there being commissioner of the revenue of the said United States, and [*387 then and there interested and employed in the execution of the said office, to receive proposals for contracting to build a light-house on Cape Hatteras, and a beacon on Shell Castle island, to contract with, and give a preference to him the said Robert Worrall, for the building of the said light-house and beacon, and in order to prevail upon him, the said Tench Coxe, to agree to give him, the said Robert Worrall, the preference in and the benefit of such contract, he the said Robert Worrall, then and there, did wickedly, advisedly and corruptly, offer to give the said Tench Coxe, then and there being commissioner of the revenue of the United States, as aforesaid, a large sum of money, to wit: the sum of seven hundred pounds, money of Pennsylvania, equal in value to $1866.67, in contempt of the laws and constitution of the United States, to the evil example of others in the like case offending, and against the peace and dignity of the said United States."

On the evidence, it appeared, that, in consequence of instructions from the secretary of the treasury, Mr. Coxe had officially invited proposals for erecting the light-house, &c., mentioned in the indictment, that the defendant presented proposals; and while they were under consideration, he sent the offensive letter, which was dated at Philadelphia; but Mr. Coxe having removed his office (in consequence of the yellow fever) to Burlington, in the state of New Jersey, received the letter at the latter place, on the 28th of September 1797, with other dispatches from the post-office of Bristol in

Pennsylvania. On the receipt of the letter, Mr. Coxe immediately consulted Mr. Ingersoll (the attorney-general of the state), communicated the circumstances that had occurred to the president, and invited the defendant to a conference at Burlington. In this conference, the defendant acknowledged having written and sent the letter; declared that no one else knew its contents, for "in business done in his chamber, he did not let his left hand know what his right hand did;" and repeated the offer of allowing Mr. Coxe a share in the profits of the contract. He then pressed for an answer; but was referred by Mr. Coxe to the period, when the public offices should be again opened in Philadelphia. Accordingly, soon after the revival of business in the city, the defendant called at Mr. Coxe's office; the whole subject was gone over, and perfectly recognised; the offer to give the money mentioned in the letter was repeated; and in the fullest manner, the defendant gave Mr. Coxe to understand, that he would allow 700*l.* as a consideration for Mr. Coxe's procuring him the contract. It was not positively stated, that the letter was produced to the defendant, at this interview; but he adverted to, and unequivocally confirmed, its contents.

On these facts, *M. Levy*, for the defendant, observed that it was not *388] sufficient for the purpose of conviction, to prove *that the defendant was guilty of an offence; but the offence must also appear to be legally defined, and it must have been committed within the jurisdiction of the court which undertakes to try and punish it. The 6th article of the amendments to the federal constitution (1 U. S. Stat. 21) provides, indeed, expressly, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state or district wherein the crime shall have been committed, &c." Now, in the present instance, there is no proof that the criminal letter was written in Pennsylvania; and the proof of publication and delivery is at Burlington, in New Jersey. The first count of the indictment, therefore, must necessarily fail; and unless he is convicted upon that, he cannot be convicted on the second count, which is attempted to be supported merely by evidence of recognising in Philadelphia, a corrupt offer previously made in another place, out of the jurisdiction of the court.

The Attorney of the District (*Rawle*) replied, that according to the decision in *Dr. Hensey's case* (1 Burr. 642), the letter, being dated at Philadelphia, is, in itself, sufficient proof that it was written there. But the letter was put into the Bristol post-office by the defendant; and consequently, by his act, done in Pennsylvania, it was caused to be delivered to Mr. Coxe at Burlington. The opposite doctrine, indeed, would furnish absolute impunity to every offender of this kind, whose crime was not commenced and consummated in the same district; for the defendant, it is said, cannot be punished in Pennsylvania, because the letter was delivered to Mr. Coxe in New Jersey; and, by a parity of reasoning, he could not be punished in New Jersey, because it was neither written, nor delivered by him, within the jurisdiction of that state. To show that the offer of a bribe is indictable, though the bribe is not accepted, he referred to 4 Burr. 2494; 1 Ld. Raym. 1377.

By the Court.—The letter appears by its date to have been written in Pennsylvania; and it is actually delivered by the defendant, at a post-office

in Pennsylvania. The writing and the delivery at the post-office (thus putting it in the way to be delivered to Mr. Coxe) must be considered, in effect, as one act; and so far as respects the defendant, it is consummated within the jurisdiction of the court. We, therefore, think, that the first count in the indictment is sufficiently supported. But, on the second count, there can be no possible doubt, if the testimony is credited. The defendant, in the city of Philadelphia, unequivocally repeats, in words, the corrupt offer, which he had previously made to Mr. Coxe in writing.

Verdict, guilty on both counts of the indictment.

*Dallas (who had declined speaking on the facts before the jury), now moved in arrest of judgment, alleging that the circuit court [*389 could not take cognisance of the crime charged in the indictment. He premised, that, independent of the general question of jurisdiction, the indictment was exceptionable, inasmuch as it recited the act of congress, making it the duty of the secretary of the treasury to form the contracts contemplated, but did not state the authority for devolving that duty on the commissioner of the revenue; and consequently, it could not be inferred, that the corrupt offer was made to seduce the commissioner from the faithful execution of an *official public trust*, which was the gist of the prosecution.

But he contended, that the force of the objection to the jurisdiction, superseded the necessity of attending to matters of technical form and precision, in presenting the accusation. It will be admitted, that all the judicial authority of the federal courts must be derived, either from the constitution of the United States, or from the acts of congress made in pursuance of that constitution. It is, therefore, incumbent upon the prosecutor to show, that an offer to bribe the commissioner of the revenue, is a violation of some constitutional or legislative prohibition. The constitution contains express provisions, in certain cases, which are designated by a definition of the crimes; by a reference to the characters of the parties offending; or by the exclusive jurisdiction of the place where the offences were perpetrated: but the crime of attempting to bribe, the character of a federal officer, and the place, where the present offence was committed, do not form any part of the constitutional express provisions, for the exercise of judicial authority in the courts of the Union. The judicial power, however, extends, not only to all cases, in law and equity, arising under the constitution; but likewise to all such as shall arise under the laws of the United States (Art. III., § 2). and besides the authority specially vested in congress, to pass laws for enumerated purposes, there is a general authority given "to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or office thereof." (Art. I., § 8.) Whenever, then, congress think any provision necessary to effectuate the constitutional power of the government, they may establish it by law; and whenever it is so established, a violation of its sanctions will come within the jurisdiction of this court, under the 11th section of the judicial act, which declares, that the circuit court "shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States, &c." (1 U. S. Stat. 78). Thus, congress have provided by law, for the *punishment of [*390 treason, misprision of treason, piracy, counterfeiting any public cer-

tificate, stealing or falsifying records, &c.; for the punishment of various crimes, when committed within the limits of the exclusive jurisdiction of the United States; and for the punishment of bribery itself, in the case of a judge, an officer of the customs, or an officer of the excise. (1 U. S. Stat. 117; Ibid. 175, § 66; Ibid. 210, § 47). But in the case of the commissioner of the revenue, the act constituting the office does not create or declare the offence (1 U. S. Stat. 280, § 6); it is not recognised in the act, under which proposals for building the light-house were invited (1 U. S. Stat. 368); and there is no other act that has the slightest relation to the subject.

Can the offence, then, be said to arise under the constitution or the laws of the United States? And, if not, what is there to render it cognisable under the authority of the United States? A case arising under a law must mean a case depending on the exposition of a law in respect to something which the law prohibits or enjoins. There is no characteristic of that kind in the present instance. But it may be suggested, that the office being established by a law of the United States, it is an incident, naturally attached to the authority of the United States, to guard the officer against the approaches of corruption in the execution of his public trust. It is true, that the person who accepts an office may be supposed to enter into a compact to be answerable to the government which he serves for any violation of his duty; and having taken the oath of office, he would unquestionably be liable, in such case, to a prosecution for perjury in the federal courts. But because one man, by his own act, renders himself amenable to a particular jurisdiction, shall another man, who has not incurred a similar obligation, be implicated? If, in other words, it is sufficient to vest a jurisdiction in this court, that a federal officer is concerned; if it is a sufficient proof of a case arising under the law of the United States to affect other persons, that such officer is bound by law to discharge his duty with fidelity—a source of jurisdiction is opened, which must inevitably overflow and destroy all the barriers between the judicial authorities of that state and the general government. Anything which can prevent a federal officer from the punctual, as well as from an impartial, performance of his duty; an assault and battery; or the recovery of a debt, as well as the offer of a bribe; may be made a foundation of the jurisdiction of this court; and considering the constant disposition of power to extend the sphere of its influence, fictions will be resorted to when real cases cease to occur. A mere fiction, that the defendant is in the custody of the marshal, has rendered the jurisdiction of the *King's *391] Bench universal in all personal actions. Another fiction, which state the plaintiff to be a debtor of the crown, gives cognisance of all kinds of personal suits to the Exchequer, and the mere profession of an attorney attaches the privilege of suing and being sued in his own court. If, therefore, the disposition to amplify the jurisdiction of the circuit court exists, precedents of the means to do so are not wanting, and it may hereafter be sufficient to suggest that the party is a federal officer, in order to enable this court to try every species of crime, and to sustain every description of action.

But another ground may, perhaps, be taken to vindicate the present claim of jurisdiction. It may be urged, that though the offence is not specified in the constitution nor defined in any act of congress; yet, that it is an offence at common law, and that the common law is the law of the United

States, in cases that arise under their authority. The nature of our federal compact will not, however, tolerate this doctrine. The twelfth article of the amendment stipulates that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In relation to crimes and punishments, the objects of the delegated power of the United States are enumerated and fixed. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States, and may define and punish piracies and felonies committed on the high seas, and offences against the law of nations. Art I. And so, likewise, Congress may make all laws which shall be necessary and proper for carrying into execution the powers of the general government. But here is no reference to a common-law authority: every power is matter of definite and positive grant, and the very powers that are granted cannot take effect until they are exercised through the medium of a law. Congress had, undoubtedly, power to make a law, which should render it criminal to offer a bribe to the commissioner of the revenue; but not having made the law, the crime is not recognised by the federal code, constitutional or legislative, and consequently, it is not a subject on which the judicial authority of the Union can operate.

The cases that have occurred since the establishment of the federal constitution confirm these general principles. The indictment against *Henfield*, an American citizen, for enlisting and serving on board a French privateer, while she captured a Dutch merchant ship, &c., expressly charged the defendant with a violation of the treaties existing between the United States and the United Netherlands, Great Britain, &c., which is a matter cognisable under the federal authority, by the very words of the constitution.[1] The jurisdiction, in the indictment *against *Ravara*, was sustained by reason of the defendant's official character as consul.(*a*) And in a [*392 recent prosecution by the state of Pennsylvania against *Schaffer*, in the mayor's court of Philadelphia,(*b*) a motion in arrest of judgment was overruled by the recorder (Mr. Wilcocks), though the offence consisted in forging claims to land-warrants, issuable under the resolutions of congress; and although the cognisance of all crimes and offences cognisable under the authority of the United States is exclusively vested in the district and circuit courts.

Rawle (the attorney of the district) observed, that the exception, taken in support of the motion in arrest of judgment, struck at the root of the whole system of the national government; for, if opposition to the pure, regular and efficient administration of its affairs, could thus be made by fraud, the experiment of force might next be applied; and doubtless, with equal impunity and success. He concluded, however, that it was unnecessary to reason from the inconvenience and mischief of the exception; for the offence was strictly within the very terms of the constitution, arising under the laws of the United States. If no such office had been created by the laws of the United States, no attempt to corrupt such an officer could

(*a*) *Ante*, p. 297.
(*b*) Commonwealth *v.* Schaffer, 4 Dall. xxvi.

[1] Whart. St. Trials, 49.

have been made; and it is unreasonable to insist, that merely because a law has not prescribed an express and appropriate punishment for the offence, that, therefore, the offence, when committed, shall not be punished by the circuit court, upon the principles of common-law punishment. The effect, indeed, of the position is still more injurious; for unless this offence is punishable in the federal courts, it certainly is not cognisable before any state tribunal. The true point of view for considering the case, may be ascertained, by an inquiry, whether, if Mr. Coxe had accepted the bribe, and betrayed his trust, he would not have been indictable in the courts of the United States? If he would be so indictable, upon the strongest principles of analogy, the offence of the person who tempted him, must be equally the subject of animadversion before the same judicial authority. The precedents cited by the defendant's counsel are distinguishable from the present indictment. The prosecution against *Henfield* was not expressly on the treaty, but on the law of nations, which is a part of the common law of the United States; and the power of indicting for a breach of treaty, not expressly providing the means of enforcing performance in the particular instance, is itself a common-law power. Unless the judicial system of the United States justified a recourse to common law, against an individual *393] guilty of a breach of treaty, the offence, where no *specific penalty was to be found in the treaty, would, therefore, remain unpunished. So, likewise, with respect to *Ravara*, although he held the office of a consul, he was indicted and punished at the common law. The offence charged in *Respublica* v. *Schaffer*, did not arise under the laws of the United States; but was simply the forgery of the names of private citizens, in order to defraud them of their rights; and even so far as the forgery might be supposed to deceive the public officers, it was a deception in regard to a mere official arrangement for ascertaining transfers of donation claims, and not in regard to any act directed by law to be performed. But a further distinction presents itself. The donations to the soldiers were founded upon resolutions of the United States in congress, passed long before the adoption of the present constitution. The courts of the several states, therefore, held a jurisdiction of the offence, which, without positive words or necessary implication, was not to be divested. The case did not come within the expressions in the constitution, "cases arising under the constitution and laws of the United States," &c., nor has it been expressly provided for by any act under the present constitution. The criminal jurisdiction of the circuit court, which, wherever it exists, must be exclusive of state jurisdiction, cannot, perhaps, fairly be held to operate retrospectively, by withdrawing from the state judicatures powers they held, and duties they performed, previously to the constitution from which the circuit court derived its birth.

Chase, Justice.—Do you mean, Mr. Attorney, to support this indictment, solely at common law? If you do, I have no difficulty upon the subject: the indictment cannot be maintained in this court.

Rawle, answering in the affirmative, Chase, Justice, stopped *M. Levy*, who was about to reply, in support of the motion in arrest of judgment; and delivered an opinion to the following effect:

Chase, Justice.—This is an indictment for an offence highly injurious to

morals, and deserving the severest punishment; but as it is an indictment at common law, I dismiss, at once, everything that has been said about the constitution and laws of the United States.

In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state constitution and policy, which do not affect him in his relation to the United States: for the constitution of the Union is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power, that is *not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed. Besides the particular cases, which the 8th section of the 1st article designates, there is a power granted to congress to create, define and punish crimes and offences, whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of the government; and although bribery is not among the crimes and offences specifically mentioned, it is certainly included in this general provision. The question, however, does not arise about the power, but about the exercise of the power:—Whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal? Now, it appears to my mind, to be as essential that congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction. [*394

It is attempted, however, to supply the silence of the constitution and statutes of the Union, by resorting to the common law, for a definition and punishment of the offence which has been committed: but, in my opinion, the United States, as a federal government, have no common law; and consequently, no indictment can be maintained in their courts, for offences merely at the common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet, it is impossible to trace when, or how, the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither, as a birth-right and inheritance, so much of the common law, as was applicable to their local situation, and change of circumstances. But each colony judged for itself, what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity, in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England is the law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits

between citizen and citizen, whether they are instituted in a federal, or state court.

*395] *But the question recurs, when and how, have the courts of the United States acquired a common-law jurisdiction, in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents: Now, the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the states; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?

Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common-law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction: but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say, whether the offence is at this time cognisable in a state court. But, certainly, congress might have provided, by law, for the present case, as they have provided for other cases of a similar nature; and yet, if congress had ever declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.

Peters, Justice.—Whenever a government has been established, I have always supposed, that a power to preserve itself was a necessary, and an inseparable concomitant. But the existence of the federal government would be precarious, it could no longer be called an independent government, if, for the punishment of offences of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the state tribunals, or the offenders must escape with absolute impunity. The power to punish misdemeanors, is originally and strictly a common-law power; of which, I think, the United States are constitutionally possessed. It might have been exercised by congress, in the form of a legislative act; but it may also, in my opinion, be enforced in a course of judicial proceeding. Whenever an offence aims at the subversion of any federal institution, or at the corruption of its public officers, it is an offence against the well-being of the United States; from its very nature, it is cognisable under their authority; and consequently, it is within the jurisdiction of this court, by virtue of the 11th section of the judicial act.

*396] *The Court being divided in opinion, it became a doubt, whether sentence could be pronounced upon the defendant; and a wish was expressed by the judges and the attorney of the district, that the case might be put into such a form, as would admit of obtaining the ultimate decision of the supreme court, upon the important principle of the discussion: but the counsel for the prisoner did not think themselves authorised to enter into a compromise of that nature. The Court, after a short consultation, and declaring, that the sentence was mitigated in consideration of the defendant's circumstances, proceeded to adjudge—

That the defendant be imprisoned for three months; that he pay a fine of $200; and that he stand committed, until this sentence be complied with, and the costs of prosecution paid.

HOLLINGSWORTH *v.* ADAMS.

Jurisdiction in foreign attachment.

Process of foreign attachment cannot be issued by a circuit court, when the defendant is domiciled abroad, or not found within the district, so that it can be served upon him.[1]

FOREIGN ATTACHMENT, returnable to the present term. The defendant was stated to be a citizen of Delaware, in the process which had issued; and *M. Levy*, having produced an affidavit in proof of that fact, moved to quash the writ, on the ground that the federal courts had no jurisdiction, in cases of foreign attachment. By the 11th section of the judicial act (1 U. S. Stat. 78), it is expressly provided, that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Now, this is a civil suit, brought here by original process against the defendant, who is an inhabitant of another district, and was not found in Pennsylvania at the time of serving the writ.

Thomas and *Hallowell*, on behalf of the plaintiff, wished for time to inquire into the practice; but not being able, on the next day, to assign any satisfactory reason in maintenance of the action,

THE COURT directed the writ to be quashed, with costs.

WILKINSON *et al.* *v.* NICKLIN *et al.*

Bills of exchange.

The indorsement of a bill in blank, passes all the interest in it, to every indorsee in succession, discharged from any obligation subsisting between the original parties, which does not appear upon its face.

The fact that a bill is noted for non-acceptance, is not notice to a subsequent indorsee, of the existence of any equity between the original parties.

THIS was an action brought by the indorsees of a bill of exchange, drawn by McClenachan & Moore, upon George Barclay, of London, in favor of the defendants, and by them indorsed *in blank, to Arthur Crammond & Co., who likewise indorsed and discounted it with their bankers, [*397 the present plaintiffs, under the following circumstances: The defendants, having opened a commercial correspondence with Arthur Crammond & Co., of London, remitted the bill of exchange in question, to be passed to their credit, in their general account with those gentlemen. The bill was noted

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[1] Poland v. Sprague, 12 Pet. 300; Chaffee v. Hayward, 20 How. 208; Picquet v. Swan, 5 Mason 35; Richmond v. Dreyfous, 1 Sumn. 131; Clark v. New Jersey Steam Nav. Co., 1 Story 531; Sadler v. Fallon, 2 Curt. 579; Day v. Newark India Rubber Man. Co., 1 Bl. C. C. 628; Wilson v. Pierce, 15 Law Rep. 137.

on the face of it for non-acceptance. It was, afterwards, on the 4th of August 1796, paid in short, on account of Arthur Crammond & Co., with their blank indorsement, to the banking-house of the plaintiffs; but on the 19th of the same month, the amount was carried out to the credit of Arthur Crammond & Co., as if it had been then discounted by the plaintiffs; and it was said by a witness, examined under a commission, that, after this discount, the money had been duly paid upon the drafts of Arthur Crammond & Co.

The counsel for the *defendants* stated, that they proposed to show by evidence, that the bill of exchange was remitted on account of the defendants; and that Arthur Crammond & Co. were in very great pecuniary embarrassment, at the time of the alleged discount of the bill of exchange, and had soon afterwards become bankrupt. From these premises, from the nature of the previous deposit, and, above all, from the dishonored state of the bill, when it was deposited and discounted (which was enough to have prompted an inquiry into the real circumstances of the case), it was intended to argue, that the plaintiffs knew that the bill was, in fact, the property of the defendants; and that the eventual discount was colorable and collusive, for the mere purpose of recovering the damages, or of securing a pre-existing balance due to the plaintiffs from Arthur Crammond & Co., who were on the eve of a public failure. 3 T. R. 80. If the plaintiffs did know the facts, they cannot be entitled to any more benefit from the possession of the bills, than Arthur Crammond & Co. themselves.

The counsel for the *plaintiffs* (who had, indeed, anticipated the defence in their opening) insisted, that the general, unrestricted nature of the indorsement, had empowered Arthur Crammond & Co. to pass the bill to whomsoever they pleased; and that whatever might be the imputation on them for a breach of trust, it could not affect the plaintiffs, who had paid a valuable consideration for the bill; and who ought not to be charged with collusion and fraud, upon strained inferences and slight presumptions. Their knowledge of the transactions between the defendants and Arthur Crammond & Co. has not been proved; and it would be a violation of the most important commercial principles, of the most authoritative adjudications, to permit such a defence to be made, against the claim of an indorsee. The *398] distinction between restricted indorsements, and indorsements *which leave the bill to a free negotiation, has been fully established (2 Burr. 1216, 1226–7); and an indorsee, in the latter case, cannot be affected even by letters accompanying the bill. Rep. temp. Hardw. 11. Nor does the reason of the case in 3 T. R. 80 (where the note was negotiated after the term of payment had elapsed), apply to a protest for non-acceptance. Bills are often so protested, and yet are eventually paid. The strongest presumption arising upon a protest for non-acceptance, is, that the drawee has not effects of the drawer in his hands, at the time of presenting the bill: but when a note has been protested for non-payment, the fair presumption is, that the drawer is either unable to pay it, or has a legal excuse for not paying it; and the purchaser of the note, under such circumstances, has a reasonable warning, and must take it at his peril.

CHASE, Justice.—The defence cannot be admitted. There is no rule more perfectly established, there is none which ought to be held more sacred in commercial transactions, than that the blank indorsement of a bill of exchange passes all the interest in the bill, to every indorsee, in succession, discharged from any obligation which might subsist between the original parties, but which does not appear upon the face of the instrument itself.

PETERS, Justice.—Though I can easily suppose cases of hardship may arise, and though I am disposed, indeed, to think that strong equitable circumstances now exist in favor of the defendants; yet, the rule of law is so well established, and, upon general principles, is so beneficial, that I cannot persuade myself, in any degree, to dispense with its operation. I am, therefore, of opinion, that the evidence in support of the defence proposed, ought not to be admitted.

Verdict for the plaintiffs.

Ingersoll and *Lewis*, for the plaintiffs. *E. Tilghman* and *Dallas*, for the defendants.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1790.

This being the period prescribed by law, for holding the first term of the Supreme Court of the United States, the judges met at New York, the seat of the Federal government, their respective commissions were read, and they were qualified according to law.

John Jay, appointed Chief Justice, by a commission bearing date the 26th of September 1789.

William Cushing, appointed one of the Justices, 27th September 1789.

James Wilson, appointed one of the Justices, 29th September 1789.

John Blair, appointed one of the Justices, 30th September 1789.

Edm. Randolph, appointed Attorney-General of the United States, 26th September 1789.

Rules.

The following rules were declared and established.

By the Court.—1. Ordered, That the seal of the court shall be the arms of the United States, engraved on a piece of steel of the size of a dollar, with these words in the margin: "The seal of the supreme court of the United States;" and that the seals of the circuit court shall be the arms of the United States, engraven on circular pieces of silver of the size of a half dollar, with these ords in the margin, viz., in the upper part, "The seal of the circuit court;" and in the lower part, the name of the district for which it is intended.

2. Ordered, That (until further orders) it shall be requisite to the admission of attorneys and counsellors to practise in this court, that they shall have been such for three years past in the supreme court of the state to which they respectively belong, and that their private and professional character shall appear to be fair. Ordered, That counsellors shall not practise as attorneys, nor attorneys as counsellors in this court.

3. Ordered, that they respectively take the following oath, viz. "I, ———

do solemnly swear, that I will demean *myself as an attorney (or counsellor) of the court, agreeably and according to law; and that I will support the constitution of the United States."

4. Ordered, That (unless, and until, it shall be otherwise provided by law) all process of this court shall be in the name of "the PRESIDENT of the UNITED STATES."

The court adjourned, *sine die.*

AUGUST TERM, 1790.

THE COURT being met, a commission appointing JAMES IREDELL one of the justices, bearing date the 10th of February 1790, was read; and he was qualified according to law.

The court adjourned, *sine die.*

FEBRUARY TERM, 1791.

THE COURT being met at Philadelphia, the seat of the Federal government, it was—

ORDERED, That the counsellors and attorneys, admitted to practise in this court, shall take either an oath, or, in proper cases, an affirmation, of the tenor prescribed by the rule of this court on that subject, made in February term 1790.

After qualifying a number of counsellors and attorneys, the court adjourned, *sine die.*

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*401] *AUGUST TERM, 1791.

WEST, Plaintiff in error, *v.* BARNES *et al.*

Writ of error.

Writs of error can only issue from the clerk's office of the supreme court.[1]

ON the first day of the term, *Bradford* presented to the court a writ, purporting to be a writ of error, issued out of the office of the clerk of the circuit court for Rhode Island district, directed to that court, and commanding a return of the judgment and proceedings rendered by them in this cause: and thereupon, he moved for a rule, that the defendant rejoin to the errors assigned in this cause.

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[1] The act of 8th May 1792, § 9 (1 U. S. Stat. 278), provided, that the clerks of the circuit courts might issue writs of error, returnable in the supreme court; and this has been incorporated in the Revised Statutes, § 1004.

Barnes, one of the defendants (a counsellor of the court), objected to the validity of the writ, that it had issued out of the wrong office: and after argument—

THE COURT were unanimously of opinion, that writs of error to remove causes to this court from inferior courts, can regularly issue only from the clerk's office of this court.

Motion refused.

VANSTOPHORST *et al.* *v.* STATE OF MARYLAND.

Commission.

A commission for the examination of witnesses will not be awarded, even by consent, until commissioners are named.

THE Attorney-General (*Randolph*) moved, on behalf of the plaintiffs, that a commission should issue to examine witnesses in Holland; to which the opposite counsel assented, although the commissioners were not named. But—

BY THE COURT.—We will not award the commission, until commissioners are named.

This being done, the motion was granted.

FEBRUARY TERM, 1792.

OSWALD, administrator, *v.* STATE OF NEW YORK.

SUMMONS. In this case, the marshal had returned the writ served; and now, *Sergeant* moved for a *distringas*, to compel an appearance on the part of the state.

*While, however, the court held the motion under advisement, it was voluntarily withdrawn, and the suit discontinued.(*a*) [*402

AUGUST TERM, 1792.

THE COURT being met, a commission, appointing THOMAS JOHNSON one of the justices, bearing date the 7th of November 1791, was read; and he was qualified according to law.

(*a*) But see s. c. *infra*, and Grayson v. Virginia, 3 Dall. 320.

Oswald, administrator, *v.* State of New York.

Return of process.

Return of process will be enforced, by rule on the marshal

Summons. *Ingersoll* moved for a rule on the marshal of the district of New York, to return the writ in this cause; and, after advisement, The Court granted the rule in the following terms:

Ordered, That the marshal of New York district return the writ to him directed in this cause, before the adjournment of this court, if a copy of this rule shall be seasonably served upon him, or his deputy, or, otherwise, on the first day of the next term. And that in case of a default, he do show cause therefor, by affidavit taken before one of the judges of the United States.

State of Georgia *v.* Brailsford *et al.*

Injunction.

An injunction granted, to restrain the marshal from paying over money, collected by execution, until the right of the complainant to the same (which could not be decided in the original suit) should be determined.

This was a bill in equity, filed by "His Excellency Edward Telfair, Esq., governor and commander-in-chief in and over the state of Georgia, in behalf of the said state, complainant," against Samuel Brailsford, Robert Wm. Powell, and John Hopton, merchants and copartners, and James Spaulding, surviving partner of Kelsall & Spalding, defendants. The bill set forth the following case:

"That on the 4th of May 1782, the State of Georgia being then free, sovereign and independent, enacted a law entitled 'An act for inflicting penalties on, and confiscating the estates of, such persons as are therein *403] declared *guilty of treason, and for other purposes therein mentioned.' That, among other things, the law contained the following clauses: 'And whereas, there are divers estates and other property within this state, belonging to persons who have been declared guilty, or convicted, in one or other of the United States, of offences which have induced a confiscation of their estates or property within the state of which they were citizens: Be it, therefore, enacted, by the authority aforesaid, that all and singular the estates, both real and personal, of persons under this description, of whatsoever kind or nature, together with all rights and titles, which they may, do or shall hold, in law or equity, or others in trust for them, and also all the debts, dues and demands, due or owing to British merchants, or others, residing in Great Britain (which shall be appropriated as hereinafter mentioned), owing or accruing to them, be confiscated to and for the use and benefit of this state, in like manner and form of forfeiture as they were subjected to in the states of which they respectively were citizens, and the moneys arising from the sales which shall take place, by virtue and in pursuance of this act, to be applied to such uses and purposes as the legislature shall hereafter direct.

"'And be it further enacted, that all debts, dues and demands, due or owing to merchants or others residing in Great Britain, be and they are hereby *sequestered*, and the commissioners appointed under this act, or a majority of

them, are hereby empowered to recover, receive and deposit the same in the treasury of this state, in the same manner, and under the same regulations, as debts confiscated, there to remain for the use of this state, until otherwise appropriated by this or any future house of assembly.

"'And whereas, there are various persons, subjects of the king of Great Britain, possessed of or entitled to estates, real and personal, which justice and sound policy require should be applied to the benefit of this state; Be it, therefore, enacted, by the authority aforesaid, that all and singular the estates, real and personal, belonging to persons, being British subjects, of whatsoever kind or nature, which they may be possessed of, except as before excepted, or others in trust for them, or that they are or may be entitled to, in law or equity, as also all debts, dues or demands, owing or accruing to them, be confiscated to and for the use and benefit of this state, and the moneys arising from the sales which shall take place by virtue of and in pursuance of this act, to be applied to such uses and purposes as the legislature shall hereafter direct.'

"That by the operation of these clauses, all the debts, dues and demands of the citizens of Georgia to persons who had *been subjected to the penalties of confiscation in other states, and of British merchants [*404 and others residing in Great Britain, and of all other British subjects, were vested in the said state.

"That James Spalding, a citizen of Georgia, and surviving copartner of Kelsall & Spalding, was indebted to the defendants in the penal sum of 7058*l.* 9*s.* 5*d.* upon a bond dated the —— of ——— 1774, which debt, by virtue of the said recited law, was transferred from the obligees and vested in the state—Brailsford being a native subject of Great Britain, constantly residing there from the year 1767, until after the passing of the law; Hopton's estate, real and personal (debts excepted), having been expressly confiscated by an act of the legislature of South Carolina; and Powell coming within the description of persons, whose estates, real and personal (debts excepted), were also confiscated by acts of the legislature of South Carolina, if, after refusing to take the oath of allegiance, they returned to the state.

"That an action had been brought upon the bond, by Brailsford, Powell and Hopton, against James Spalding, as surviving partner of Kelsall & Spalding, in the circuit court for the district of Georgia, of ——— term 1791, in which action, there was a plea, demurrer to the plea, joinder in demurrer, and judgment thereupon for the plaintiffs.

"That the state had never relinquished its claim to this debt, but on the contrary, had asserted it by divers acts of the legislative, executive and judicial departments; and, particularly, by directing the attorney-general to apply for a rule, to be admitted to assert the claim, in all suits brought in any court, for debts within the descriptions of the confiscation law above cited.

"That the attorney-general applied to the circuit court, for the admission of the state, as a party, to defend its claim in the said suit of Brailsford and others *v.* Spalding, then depending there, which application was rejected; and that in that suit, as well as divers other suits, recoveries were had against citizens of the state, by British merchants, for debts within the descriptions of the confiscation law, upon the sole principle of debtor and creditor, and without any reference to the right and claim of the state."

The bill proceeded to charge a confederacy between the parties to the suit in the circuit court, to defraud the state; and that in pursuance thereof, the plaintiffs had issued execution against the defendant, and the defendant had confederated with them not to take out a writ of error; so that the defendant's property would be levied on, and disposed of, and the state would be defrauded of its just claim thereon.

The bill then suggested the general foundation for the jurisdiction on the equity side of the court; put the proper interrogatories; *and concluded with praying "that any levy, or further levies, under the said execution, and any sales in pursuance of a levy, and any moneys already raised, or that may be raised thereon, may be stayed in the hands of the marshal of the said circuit court, by an injunction from this honorable court. And that the marshal be directed to pay such sum, or sums, raised as aforesaid, to the treasurer of the said state of Georgia, to and for the use of the same, and that the said James Spalding be decreed to pay to the said treasurer the balance which may be due on the bond aforesaid, for the use aforesaid. And that the said state may be further or otherwise relieved, in all and singular the premises, as the nature and circumstances of the case shall require, and as to the court shall seem meet."

*405]

With the bill, there was filed an affidavit, made by Mr. John Wereat (the agent for Georgia), affirming "that the allegations therein contained are true;" and *Dallas*, for the state, moved that an injunction might issue, to the circuit court, to stay further proceedings, and also to the marshal of the Georgia district, to stay the money in his hands, if he should have levied, or shall levy, the same, on any execution issued in the cause of Brailsford *et al.* *v.* Spalding.

The motion was opposed by *Randolph*, for the defendants; and after argument, the judges delivered their opinions *seriatim*, on the 11th of August 1792.

JOHNSON, Justice.—In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the court. It does not appear to me, that the present bill sufficiently claims such an interposition. If the state has a right to the debt in question, it may be enforced at common law, notwithstanding the judgment of the circuit court; and there is no suggestion in the bill, though it has been suggested at the bar, that the state is likely to lose her right by the insolvency either of Spalding, the original debtor, or of Brailsford, who will become her debtor for the amount, if he receives it, when in law he ought not to receive or retain it. Nor does the bill state any particular confederacy or fraud. The refusal to admit the attorney-general as a party on the record, was the act of a competent court; and it is not sufficient barely to allege, that the defendant has not chosen to sue out a writ of error. The case might, perhaps, be made better; but as I can only know, at present, the facts which the bill alleges, and which the affidavit supports, it is my opinion, that there is not a proper foundation for issuing an injunction.

IREDELL, Justice.—I sat in the circuit court, when the judgment was

rendered in the case of Brailsford and others *v.* *Spalding; but I shall give my opinion, on the present motion, detached from every previous consideration of the merits of the cause.

The debt claimed by the plaintiffs below, was likewise claimed by the state of Georgia. The state applied to be admitted to assert her claim, but the application was rejected; nor has any writ of error been instituted upon the judgment. These facts, however, are only mentioned, to introduce this remark, that the circuit court could not, with propriety, sustain the application of Georgia; because, whenever a state is a party, the supreme court has exclusive jurisdiction of the suit; and her right cannot be effectually supported, by a voluntary appearance before any other tribunal of the Union. Not being a party, nor capable of resorting, as a party, to the circuit court, it is very much to be questioned, whether the state could bring a writ of error on the judgment there, even if her claim appeared on the record.

Every principle of law, justice and honor, however, seem to require, that the claim of the state of Georgia should not be, indirectly, decided or defeated, by a judgment pronounced between parties, over whom she had no control, and upon a trial, in which she was not allowed to be heard. If, indeed, the court could not devise a mode, for admitting a fair investigation and determination upon that claim, it would be useless to grant an injunction: but I think a mode may easily be prescribed, in strict conformity with the practice and principles of equity.

It was in the power of the defendant in the circuit court, to have filed a bill of interpleader, in order, for his own safety, to settle the rights of the contending parties; but neither in that form, nor by instituting a suit herself, could Georgia have derived the benefit of supporting her claim in her own way, before any other than the supreme court. In this court, therefore, we ought now to place the state upon the same footing, as if a bill of interpleader had been regularly filed here; which can be done by sustaining the present suit; and when the parties are all before us, we may direct a proper issue to be formed, and tried at the bar. Thus, justice will be done to Georgia, and an irreparable injury may be prevented; while the adverse party, even if he ultimately succeeds, can only complain of a short delay.

With this view, I think, that an injunction should be awarded to stay the money in the hands of the marshal, until this court shall make a further order on the subject.

Blair, Justice.—The State of Georgia seems to have done all that she could to obtain a hearing. An application was made to the circuit court, in the nature of a claim to interplead; but being refused, her alternative, under all the circumstances of the case, is an appeal to the equitable jurisdiction of the supreme *court. It is true, perhaps, as the counsel has suggested, that the defendant below pleaded the confiscation act of Georgia in [*407 bar to the action; but it is a sufficient answer to this argument, that the state was not a party; and no right can be defeated, in law, unless the party claiming it has himself an opportunity to support it.

If the state of Georgia was entitled to the bond, she is equally entitled to the money levied by the marshal in satisfaction of the bond, or rather of the judgment rendered upon it; and as the execution directs the marshal to

pay the amount to the plaintiffs below, I can perceive no other mode of preventing a compliance, while we inquire into the right of receiving the money, than that of issuing an injunction to stay it in the hands of the officer.

It appears to me, to be too early, likewise, to pronounce an opinion upon the titles in collision; since, it is enough, on a motion of this kind, to show a colorable title. The state of Georgia has set up, her confiscation act, which certainly is a fair foundation for future judicial investigation; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to issue, until we are enabled, by a full inquiry, to decide upon the whole merits of the case.

Wilson, Justice.—I confess that I have not been able to form an opinion which is perfectly satisfactory to my own mind, upon the points that have been discussed. If Georgia has a right to the bond, it is strictly a legal right; but to enforce a strictly legal right, the present seems, at the first blush, to be an awkward and irregular proceeding. Again, Georgia had not a right, or she had a right, to be admitted to a hearing in the circuit court; but in the former case, it would be no ground of complaint, that her application was rejected; for she is bound by the law; and in the other case, she would be entitled to bring the subject before us, as a court of law; since she was refused the exercise of a legal right.

It is true, that, under the federal constitution, an inferior tribunal cannot compel a state to appear as a party; but it is a very different proposition to say, that a state cannot, by her own consent, appear in any other court, than the supreme court. The general rule applies among all sovereigns, who, as equals, are not amenable to the courts of each other; and yet I remember an action was instituted and sustained, some years ago, in the name of Louis XVI., King of France, against Mr. Robert Morris, in the supreme court of Pennsylvania.[1]

Under these impressions, I am disposed to think, that the state of Georgia ought rather to have sued out a writ of error, than to have asked for an injunction; but still, in the existing *circumstances of the case, I have no objection to retain the money within the power of the court, until we can better satisfy ourselves both as to the remedy and the right. *408]

Cushing, Justice.—The judicial act expressly declares, that "suits in equity shall not be sustained, in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Now, if Georgia has any right to the debt in question, it is a right at law, for which, of course, the law will furnish a plain, adequate and complete remedy. The decision of the circuit court, in a case to which Georgia was neither party nor privy, did not, and could not, take away either the right or the remedy of the state. Nor can Spalding, the defendant below, be made liable twice, for the same debt, without his wilful *laches*. For it is in his power to bring a writ of error; and then, the whole merits of the claim of Georgia appearing on the record, we must decide it as a question of law, either by affirming or reversing the judgment, so as to bind us, in any suit which Georgia might institute for the same cause.

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[1] King of France v. Morris, cited 3 Yeates 251.

Besides, the state of Georgia (notwithstanding the judgment of the circuit court) may bring an action of *indebitatus assumpsit* against Brailsford (who is a man of fortune), after they have received the money, upon the principle of *Moses* v. *Macferlan* (2 Burr. 1005), and with stronger reason; as, in that case, the parties, in both courts, were the same; but in the case proposed, they would be different, and one of them has never been heard. In some form, therefore, Georgia may obtain complete redress at law.

I do not, upon the whole, consider the refusal of Spalding to bring a writ of error (which he is not compellable to bring), nor any other suggestion in the bill, as a sufficient foundation for exercising the equitable jurisdiction of the court; and consequently, I think, that an injunction ought not to be awarded.

JAY, Chief Justice.—My first ideas were unfavorable to the motion; but many reasons have been urged, which operate forcibly to produce a change of opinion.

The great question turns on the property of a certain bond—whether it belongs to Brailsford, or to Georgia? It is put in suit by Brailsford; but if Georgia, by virtue of the confiscation act, is really entitled to the debt, she is entitled to the money, though the evidence of the debt happened to be in the possession of Brailsford, and though Brailsford has, by that means, obtained a judgment for the amount.

Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the *hands of the marshal until the right to it is fairly decided? and so avoid the risk [*409 of putting the true owner to a suit, for the purpose of recovering it back? For my part, I think, that the money should remain in the custody of the law, until the law has adjudged to whom it belongs; and, therefore, I am content, that the injunction issue.

An injunction granted.(*a*)

HAYBURN'S CASE.

Constitutional law.

It is not in the power of congress, to assign to the judiciary any but judicial duties.

THIS was a motion for a *mandamus*, to be directed to the circuit court for the district of Pennsylvania, commanding the said court to proceed in a certain petition of William Hayburn, who had applied to be put on the pension list of the United States, as an invalid pensioner. The principal case arose upon the act of congress passed the 23d of March 1792. (1 U. S. Stat. 243.)

The Attorney-General (*Randolph*), who made the motion for the *mandamus*, having premised that it was done *ex officio*, without an application from any particular person, but with a view to procure the execution of an act of congress, particularly interesting to a meritorious and unfortunate class of citizens, THE COURT declared, that they entertained great doubt upon

(*a*) See the same case, *post*, p. 415, and 3 Dall. 1, as well as on a motion to dissolve the injunction, as on a trial of the merits, upon a feigned issue.

his right, under such circumstances, and in a case of this kind, to proceed *ex officio;* and directed him to state the principles on which he attempted to support the right. The Attorney-General, accordingly, entered into an elaborate description of the powers and duties of his office:—

But THE COURT being divided in opinion on that question, the motion, made *ex officio*, was not allowed.

The Attorney-General then changed the ground of his interposition, declaring it to be at the instance, and on behalf of Hayburn, a party interested; and he entered into the merits of the case, upon the act of congress, and the refusal of the judges to carry it into effect.

THE COURT observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the legislature, *410] at an intermediate *session, provided, in another way, for the relief of the pensioners.(a)

(a) See an act passed the 28th February 1793 (1 U. S. Stat. 324).—As the reasons assigned by the judges, for declining to execute the first act of Congress, involve a great constitutional question, it will not be thought improper to subjoin them, in illustration of Hayburn's case.

The circuit court for the district of New York (consisting of JAY, Chief Justice, CUSHING, Justice, and DUANE, District Judge) proceeded, on the 5th of April 1791, to take into consideration the act of congress entitled, "An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions;" and were, thereupon, unanimously, of opinion and agreed,

"That by the constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the circuit, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *personal* description. That the judges of this court regard themselves as being the commissioners designated by the act, and therefore, as being at liberty to accept or decline that office. That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the national legislature, they will execute this act in the capacity of commissioners.

"That as the legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed. That the judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed, as commissioners, to execute the business of this act in the same court room, or chamber."

*The circuit court for the district of Pennsylvania (consisting of WILSON and BLAIR, Justices, and PETERS, District Judge) made the following representation, in a letter jointly addressed to the president of the United States, on the 18th of April 1792.

"To you it officially belongs to 'take care that the laws' of the United States 'be faithfully executed.' Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the Union.

"The people of the United States have vested in congress all *legislative* powers granted in the constitution. They have vested in one supreme court, and in such inferior courts as the congress shall establish, 'the *judicial* power of the United States.' It is worthy of remark, that in congress the *whole* legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they 'ordained and established the constitution.' This constitution is 'the supreme law of the land.' This supreme law 'all judicial officers of the United States are bound, by oath or affirmation, to support.'

"It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle, the people of the United States, in forming their constitution, have manifested the highest regard. They have placed their *judicial* power, not in congress, but in '*courts*.' They have ordained that the 'judges of those courts shall hold their offices during good behavior,' and that 'during their continuance in office, their salaries shall not be diminished.'

"Congress have lately passed an act, to regulate, among other things, 'the claims to invalid pensions.' Upon due consideration, we have been unanimously of opinion, that, under this act, the circuit court held for the Pennsylvania district could not proceed

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded *without* constitutional authority. 2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States.

*"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary [*412 either to the obvious directions of congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, we hope never to experience again."

The circuit court for the district of North Carolina (consisting of IREDELL, Justice, and SITGREAVES, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 8th of June 1792.

"We, the judges now attending at the circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of congress lately passed, entitled, 'An act to provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, and to regulate the claims to invalid pensions.'

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the legislature, and that we never can find ourselves in a more painful situation, than to be obliged to object to the execution of any, more especially, to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the

best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

"The extreme importance of the case, and our desire of being explicit, beyond the danger of being misunderstood, will, we hope, justify us in stating our observations in a systematic manner. We therefore, Sir, submit to you the following:—

"1. That the legislative, executive and judicial departments are each formed in a separate and independent manner; and that the ultimate basis of each is the constitution only, within the limits of which each department can alone justify any act of authority.

"2. That the legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

"3. That, at the same time, such courts cannot be warranted, as we conceive, by virtue of that part of the constitution delegating *judicial* power, for the exercise of which any act of the legislature is provided, in exercising (even under the authority of another act) *any power not in its nature *judicial*, or, if *judicial*, not provided for upon the terms the constitution requires. *413]

"4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet, inasmuch as the decision of the court is not made final, but may be at least suspended in its operation, by the secretary at war, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision, which we consider to be unwarranted by the constitution; for though congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of secretary at war is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

"These, Sir, are our reasons for being of opinion, as we are at present, that this circuit court cannot be justified in the execution of that part of the act, which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for, whether, in our opinion, such purpose can or cannot be answered, it is, as we conceive, onr indispensable duty to keep open any court of which we have the honor to be judges, as long as congress shall direct.

"The high respect we entertain for the legislature, our feelings, as men, for persons whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally, in the character of commissioners, during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the peformance of the service. But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the judges of it; and as the secretary at war has not a discretion, in all instances, but only in those where he has cause to suspect imposition or mistake, to withhold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law. We do not mean, however, to preclude our

*RULE.

THE Attorney-General having moved for information, relative to the system of practice by which the attorneys and counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, the CHIEF JUSTICE, at a subsequent day stated, that—

THE COURT considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.

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*FEBRUARY TERM, 1793. [*415

OSWALD, administrator, *v.* STATE of NEW YORK.

Practice.

PROCLAMATION was made in this cause, "that any person having authority to appear for the State of New York is required to appear accordingly;" and no person appearing it was ordered, on motion of *Coxe*, for the plaintiff—

BY THE COURT.—Unless the state appears by the first day of next term to the above suit, or show cause to the contrary, judgment will be entered by default against the state.(*a*)

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selves from a very deliberate consideration, whether we can be warranted in executing the purposes of the act in that manner, in case an application should be made.

"No application has yet been made to the court, or to ourselves individually, and therefore, we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being, in general, extremely cautious in not intimating an opinion, in any case, extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a preconceived opinion, even unguardedly, much more, deliberately, given: but in the present instance, as many unfortunate and meritorious individuals, whom congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one, we determined, at all events, to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving, however, that so far as we are concerned, individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly, being so far from the weakness of supposing that there is any reproach in having committed an error, to which the greatest and best men are sometimes liable, as we should be, from so low a sense of duty, as we think it would not be the highest and most deserved reproach that could be bestowed on any men (much more on judges) that they were capable, from any motive, of persevering against conviction, in apparently maintaining an opinion, which they really thought to be erroneous."[1]

(*a*) See *ante*, p. 401; and also Chisholm, executor, *v.* Georgia, *post*, p. 419; Cutting, administrator, *v.* South Carolina, and Grayson *v.* Virginia, 3 Dall. 320.

[1] See United States v. Todd, in which the supreme court decided, on the 17th February 1794, that the judges could not act as commissioners, under the statute in question. 13 How. 52, note.

STATE of GEORGIA v. BRAILSFORD et al.

Injunction.

State of Georgia v. Brailsford, *ante*, p. 402, re-affirmed and injunction continued.

BILL IN EQUITY. This cause was again brought before the court, upon a motion by *Randolph*, to dissolve the injunction which had been issued, and to dismiss the bill.(*a*) He assigned two grounds in support of his motion: 1st. That the state of Georgia had no remedy at law, to recover the debt in question: and 2d. That even if there was a remedy at law, there was no equitable right to justify the present form of proceeding. The motion was opposed by *Ingersoll* and *Dallas;* and after argument, the opinions of the judges (in the absence of JOHNSON, Justice) were delivered as follows.

IREDELL, Justice.—It is my misfortune to dissent from the opinion entertained by the rest of the court upon the present occasion; but I am bound to decide, according to the dictates of my own judgment.

The state of Georgia complains, that having a right to the debt in question, that right has been discussed and overruled, without giving her an opportunity to be heard in support of it, though she applied to the circuit court for that purpose. It is another grievance alleged, that a writ of error has *416] not been *instituted, when, all the facts appearing upon the record, the decision of the circuit court might have undergone a full and satisfactory revision, before the tribunal of the last resort. It is true, that this latter allegation is defectively set forth in the bill; for as a writ of error could not be sued out, without entering security, the state, to entitle herself to any benefit from the exception, ought, in strictness, to have tendered a security to the defendant in the inferior court. But still, if a writ of error had been brought, it appears to me, that it could only affect the original plaintiffs and defendants in the suit; and the state of Georgia could not be made a party to the record. In this situation, it must likewise be considered, Georgia had not a constitutional right to institute a suit, nor could she, in my opinion, be admitted as a party to a proceeding in the nature of an interpleader, in any but the supreme court.

The state, however, asserts a claim to the debt in controversy, by virtue of an act of confiscation; and the debtor admits that he ought to pay the amount of his bond, but is doubtful to which of the contending parties it ought to be paid. Now, without the equitable interposition of this court, I think there will be a defect of justice; for it is obvious to me, either that the state can have no remedy at law, or, at least, that the remedy at law will not be "plain, adequate and complete." Two positions have been taken, in opposition to this opinion: 1st. That if the state is entitled to the debt, she may maintain an action on the bond against the obligors: Or, 2d. That the state might bring an action of *assumpsit* for money had and received, &c., against Brailsford, if Brailsford had no right to recover or retain it. I will cursorily consider both these positions.

1st. In the first place, it is to be recollected, that the bond is merged in the judgment; and although the judgment is said to be generally binding only on the parties, yet it is good against all the world, until it is reversed

(*a*) See *ante*, p. 402; 3 Dall. 1.

in a regular course of law. To any other suit, for the same cause, Spalding might plead the previous judgment in bar; and the plea could only be defeated, by showing fraud or collusion. There is no pretence, however, for an imputation of that kind here; since Spalding set forth the title of Georgia, as fully as the state herself could have done: and would it not be monstrous, after a judgment rendered under such circumstances, to compel him again to pay the same debt? There is neither principle nor precedent for so harsh and oppressive a doctrine.

But if a suit could be maintained upon the bond, by the state, how is she to obtain possession of the instrument, without the aid of a court of equity? Suppose, it has been deposited with the clerk of the circuit court, that officer cannot deliver it to the state, without the judicial mandate of a superior *tribunal. Suppose, it remains in the hands of Brailsford, he can hardly be expected, voluntarily, to furnish his antagonist with [*417 the means of combat. In short, it is only by the authority of this court, sitting as a court of equity, either that the operation of the judgment, obtained at common law, against Spalding, can be prevented from becoming exclusive on the question of right; or that the state of Georgia can be enabled to maintain her claim, upon its merits.

2d. It is urged, however, that the state has another remedy at law, by an action of *assumpsit* for money had and received, against Brailsford. This is, indeed, the legal *panacea* of modern times; and may, perhaps, be beneficially applied to a great variety of cases. But it cannot be pretended, that this form of action will lie, before the defendant has actually received the money which the plaintiff demands. In the present instance, the money has not been received by Brailsford; and of course, he cannot be compelled to account for it to Georgia.

The case of *Moses* v. *Macferlan*, 2 Burr. 1005, if at all applicable to the points now in controversy, will be found more favorable, I think, to the opinion which I entertain, than to the opinion which it has been cited to support. From that case (which presents a most unconscionable conduct on the part of the defendant), it is to be inferred, as I have already stated, that a judgment is a perpetual bar against a second recovery for the same cause, unless it is tainted with fraud and collusion: But the King's Bench proceed, in deciding the question then before them, on this ground, principally, that the inferior court, the court of conscience, could not take cognisance of the collateral matter which constituted the defence; whereas, in the present instance, the matter pleaded by Spalding was perfectly within the cognisance and jurisdiction of the circuit court.

From this view of the subject, therefore, I am induced to conclude, that the state of Georgia has no remedy at law; and it is sufficient for an incipient exercise of the jurisdiction of this court, that she has shown a color of title to recover the money, and that the money is in danger of being paid to another claimant. I abstain from giving any opinion upon the judgment of the circuit court; but, certainly, I should never have consented to issue an injunction, if I had thought the legal remedy of the state was plain, adequate and complete. If the bill is sustained, the money will be preserved in neutral hands; and the court may direct an issue to be tried at the bar, in order to ascertain, whether the State of Georgia, or Brailsford, is the right owner.

Blair, Justice—My sentiments have coincided, until this moment, with the sentiments entertained by the majority of the *court; but a doubt *418] has just occurred, which I think it my duty to declare.

I do not conceive, indeed, that any judgment can be binding upon the rights and interests of a third person, who is not a party to the suit. The very nature of a bill of interpleader presupposes, that the party by whom it is exhibited, would be liable a second time, if he should either voluntarily, or otherwise, pay the money which he owes, to a wrong claimant. A judgment would not, therefore, in such a case, be a bar to the action of the claimant, who is legally entitled; and who might either bring detinue or trover for the bond, against the possessor of it; or, if he instituted an action of debt against the obligor, the court might, on a proper hearing, order the instrument to be delivered into his hands.

Presuming, then, that there was a remedy at law, I have hitherto thought that there was no ground for the interference of this court, as a court of equity. But, upon reflection, it appears, that if Brailsford, who is a British subject, should get the money, under the present judgment, and leave the country, there would be great danger of a failure of justice. It was for this reason, that the injunction was originally granted; and I think, the reason ought to carry us still further. Admitting, that Georgia has a complete remedy at law; her right, though not supported by herself, has been stated to the circuit court; and though the judgment in that case is not binding upon her, yet, in any future suit, brought by her against Spalding, who is bound by the judgment, a similar difficulty will arise; for the court would then be called upon to decide, in the absence of Brailsford (who could not be a party to the common-law suit), upon his claim, as well as upon the claim of Georgia.

Since, therefore, there is no other court that can bring all the parties before them, and do general and complete justice, it is my opinion, that the bill in equity ought to be sustained; and that the subject should be no further referred to a court of law, than to obtain an opinion upon the legal title to the debt in controversy.

Jay, Chief Justice.—All the court, except the judges who have just delivered their sentiments, are of opinion, that, if the state of Georgia has a right to the debt, due originally from Spalding to Brailsford, it is a right to be pursued at common law. The bill, however, was founded in the highest equity; and the ground of equity for granting an injunction continues the same—namely, that the money ought to be kept for the party *to *419] whom it belongs. We shall, therefore, continue the injunction until the next term; when, however, if Georgia has not instituted her action at common law, it will be dissolved.(a)

(a) An amicable action was accordingly entered and tried at the bar of the supreme court, in February term 1794 (3 Dall 1), when a verdict was given for the defendant (Brailsford), and the injunction was, of course, dissolved.

CHISHOLM, executor, *v.* GEORGIA.

Suits against states.

A state may be sued, in the supreme court, by an individual citizen of another state. And in such suit judgment may be entered, in default of an appearance.

THIS action was instituted in August term 1792. On the 11th of July 1792, the marshal for the district of Georgia made the following return :

"Executed as within commanded, that is to say, served a copy thereof on his excellency Edward Telfair, Esq., governor of the state of Georgia, and one other copy on Thomas P. Carnes, Esq., the attorney-general of said state. ROBERT FORSYTH, Marshal."

Upon which, Mr. *Randolph*, the Attorney-General of the United States, as counsel for the plaintiff, made the following motion, on the 11th of August 1792. "That unless the state of Georgia, shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said state, on the fourth day of the next term, or shall then show cause to the contrary, judgment shall be entered against the said state, and a writ of inquiry of damages shall be awarded." But to avoid every appearance of precipitancy, and to give the state time to deliberate on the measures she ought to adopt, on motion of Mr. *Randolph*, it was ordered by the court, that the consideration of this motion should be postponed to the present term. And now, *Ingersoll* and *Dallas* presented to the court a written remonstrance and protestation on behalf of the state, against the exercise of jurisdiction in the cause; but in consequence of positive instructions, they declined taking any part in arguing the question. The Attorney-General, therefore, proceeded as follows :

Randolph, for the plaintiff.—I did not want the remonstrance of Georgia, to satisfy me, that the motion which I have made, is unpopular. Before that remonstrance was read, I had learnt from the acts of another state, whose will must be always dear to me, that she too condemned it. On ordinary occasions, these dignified opinions might influence me greatly; but on *this, which brings into question a constitutional right, supported by my own conviction, to surrender it, would, in me, be official perfidy. [*420

It has been expressed, as the pleasure of the court, that the motion should be discussed, under the four following forms : 1st. Can the state of Georgia, being one of the United States of America, be made a party defendant in any case, in the supreme court of the United States, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the state of South Carolina? 2d. If the state of Georgia can be made a party defendant in certain cases, does an action of *assumpsit* lie against her? 3d. Is the service of the summons upon the governor and attorney-general of the state of Georgia, a competent service? 4th. By what process ought the appearance of the state of Georgia to be enforced?

I. The constitution and the judicial law are the sources from which the jurisdiction of the supreme court is derived. The effective passages in the constitution are in the second section of the third article. "The judicial power shall extend to controversies between a state and citizens of another state. In cases in which a state shall be a party, the supreme court shall have original

jurisdiction." The judicial act thus organizes the jurisdiction delineated by the constitution. "The supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except, also, between a state and citizens of other states and aliens, in which latter case it shall have original, but not exclusive jurisdiction." Upon this basis we contend: 1st. That the constitution vests a jurisdiction in the supreme court over a state, as a defendant, at the suit of a private citizen of another state. 2d. That the judicial act recognises that jurisdiction.

1st. The constitution vests a jurisdiction in the supreme court over a state, as a defendant, at the suit of a private citizen of another state. Consult the letter of the constitution, or rather the influential words of the clause in question. The judicial power is extended to controversies between a state and citizens of another state. I pass over the word "between," as in no respect indicating who is to be plaintiff or who defendant. In the succeeding paragraph, we read a comment on these words, when it is said, that in cases in which a state shall be a *party* the supreme court shall have original jurisdiction. Is not a defendant a *party*, as well as a plaintiff? *421] If authority *be necessary for so notorious a definition, recur to 1 Harr. Ch. Pr. p. 35, where it is observed, that "in this court," that is, in the high court of chancery of England, "suits are generally commenced. prosecuted and *defended* by *parties* in their own names only." I might appeal, too, to a work of greater solemnity and of greater obligation; the articles of confederation. In describing the mode by which differences between two or more states shall be adjusted, they speak of a day to be assigned for the appearance of the *parties;* of each *party* alternately striking the names of the persons proposed as judges; of either *party* neglecting to attend; of striking names in behalf of a *party* absent; of any of the *parties* refusing to submit to the authority of the court; and of lodging the sentence among the acts of congress for the security of the *parties* concerned. Human genius might be challenged to restrict these words to a plaintiff state alone. It is, indeed, true, that according to the *order* in which the controversies of a state are mentioned, the state is the first; and from thence it may be argued, that they must be those in which a state is first named, or plaintiff. Nobody denies, that the citizens of a state may sue foreign subjects, or foreign subjects the citizens of a state. And yet, the expression of the constitution is, "between a state or the citizens thereof, and foreign states, citizens or subjects." The order, in this instance, works no difference. In common language, too, it would not violate the substantial idea, if a controversy, said to be between A. B. and C. D., should appear to be between C. D. and A. B. Nay, the opportunity fairly occurs, in two pages of the judicial article, to confine suits to states, as plaintiffs, but they are both neglected, notwithstanding the consciousness which the convention must have possessed, that the words, unqualified, strongly *tended*, at least, to subject states as defendants.

With the advantage of the *letter* on our side, let us now advert to the *spirit* of the constitution, or rather its genuine and necessary interpretation. I am aware of the danger of going into a wide history of the constitution, as a guide of construction; and of the still greater danger of laying any important stress upon the preamble, as explanatory of its powers. I resort, therefore, to the *body* of it; which shows that there may be various actions

of states, which are to be annulled. If, for example, a state shall suspend the privilege of a writ of *habeas corpus*, unless when in cases of rebellion or invasion the public safety may require it; should pass a bill of attainder or *ex post facto* law; should enter into any treaty, alliance or confederation; should grant letters of marque and reprisal; should coin money; should emit bills of credit; should make anything but gold and silver coin a tender in payment of debts; should pass a *law impairing the obligation of contracts; should, without the consent of congress, lay imposts or duties on imports or exports, with certain exceptions; should, without the consent of congress, lay any duty on tonnage, or keep troops or ships of war, in time of peace; these are expressly prohibited by the constitution; and thus is announced to the world, the probability, but certainly the apprehension, that states may injure individuals in their property, their liberty and their lives; may oppress sister states; and may act in derogation of the general sovereignty. [*422

Are states then to enjoy the high privilege of acting thus eminently wrong, without control; or does a remedy exist? The love of morality would lead us to wish that some check should be found; if the evil, which flows from it, be not too great for the good contemplated. The common law has established a principle, that no prohibitory act shall be without its vindicatory quality; or, in other words, that the infraction of a prohibitory law, although an express penalty be omitted, is still punishable. Government itself would be useless, if a pleasure to obey or transgress with impunity, should be substituted in the place of a sanction to its laws. This was a just cause of complaint against the deceased confederation. In our solicitude for a remedy, we meet with no difficulty, where the conduct of a state can be animadverted on, through the medium of an individual. For instance, without suing a state, a person arrested may be liberated by *habeas corpus;* a person attainted, and a convict under an *ex post facto* law, may be saved; those who offend against improper treaties may be protected, or who execute them, may be punished; the actors under letters of marque and reprisal may be mulcted; coinage, bills of credit, unwarranted tenders, and the impairing of contracts between individuals, may be annihilated. But this redress goes only half way; as some of the preceding unconstitutional actions must pass without censure, unless states can be made defendants. What is to be done, if, in consequence of a bill of attainder, or an *ex post facto* law, the estate of a citizen shall be confiscated, and deposited in the treasury of a state? What, if a state should adulterate or coin money below the congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What, if a state should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected, without a suit against the state. It is not denied, that one state may be sued by another; and the reason would seem to be the same, why an individual, who is aggrieved, should sue the state aggrieving. A distinction between the cases is supportable only on a supposed comparative inferiority of the *plaintiff. But the framers of the constitution could never have thought thus: they must have viewed human rights in their essence, not in their mere form. They had heard, seen, I will say, felt that legislators were not so far sublimed above other men, as to soar beyond the region of passion. Unfledged as America [*423

was in the vices of old governments, she had some, incident to her own new situation: individuals had been victims to the oppression of states.

These doctrines are moreover justified: 1st. By the relation in which the states stand to the federal government: 2d. By the law of nations, on the subject of suing sovereigns: and 3d. They are not weakened by any supposed embarrassment attending the mode of executing a decree against a state.

1st. I acknowledge, and shall always contend, that the states are sovereignties. But with the free will, arising from absolute independence, they might combine in government for their own happiness. Hence sprang the confederation; under which, indeed, the states retained their exemption from the forensic jurisdiction of each other, and, except under a peculiar modification, of the United States themselves. Nor could this be otherwise; since such a jurisdiction was nowhere (according to the language of that instrument) *expressly* delegated. This government of supplication cried aloud for its own reform; and the public mind of America decided, that it must perish of itself, and that the Union would be thrown into jeopardy, unless the energy of the general system should be increased. Then it was, the present constitution produced a new order of things. It derives its origin immediately from the people; and the people individually are, under certain limitations, subject to the legislative, executive and judicial authorities thereby established. The states are, in fact, assemblages of these individuals who are liable to process. The limitations which the federal government is admitted to impose upon their powers, are diminutions of sovereignty, at least, equal to the making of them defendants. It is not pretended, however, to deduce from these arguments alone, the amenability of states to judicial cognisance; but the result is, that there is nothing in the nature of sovereignties, combined as those of America are, to prevent the words of the constitution, if they naturally mean what I have asserted, from receiving an easy and usual construction. But pursue the idea a step further; and trace one, out of a multitude of examples, in which the general government may be convulsed to its centre without this judicial power. If a state shall injure an individual of another state, the latter must protect him by a remonstrance. What if this be ineffectual? To stop there, would cancel his allegiance; one *424] state cannot sue another for such a cause; acquiescence is not to *be believed. The crest of war is next raised; the federal head cannot remain unmoved, amidst these shocks to the public harmony. Ought then a *necessity* to be created for drawing out the general force, on an occasion so replete with horror? Is not an adjustment by a judicial form far preferable? Are not peace and concord among the states, two of the greatest ends of the constitution? To be consistent, the opponents of my principles must say, that a state may not be sued by a foreigner. What? Shall the tranquillity of our country be at the mercy of every state? Or, if it be allowed, that a state may be sued by a foreigner, why, in the scale of reason, may not the measure be the same, when the citizen of another state is the complainant?

Nor is the history of confederacies wholly deficient in analogy; although a very strict one is scarcely to be expected. A parade of deep research into the Amphictyonic Council, or the Achæan league, would be fruitless, from the dearth of historical monuments. With the best lights, they would probably be found, not to be positively identical with our union. So little did they approach to a national government, that they might well be destitute

of a common judicatory. So ready were the ancient governments to merge the injuries to individuals in a state quarrel, and so certain was it, that any judicial decree must have been enforced by arms, that the mild form of a legal discussion could not but be viewed with indifference, if not contempt. And yet, it would not be extravagant, to conjecture, that all civil causes were sustained before the Amphyctionic Council.(*a*) What we know of the Achæan confederacy, exhibits it as purely national, or rather consolidated. They had common magistrates, taken by rotation from the towns;(*b*) and the amenability of the constituent cities to some supreme tribunal, is as probable as otherwise. But, in fact, it would be a waste of time, to dwell upon these obscurities. To catch *all* the semblances of confederacies, scattered through the historic page, would be no less absurd, than to search for light in regions of darkness, or a stable jurisprudence in the midst of barbarity and bloodshed. Advancing then, into more modern times, the Helvetic union presents itself; one of whose characteristics is, that there is no common judicatory. (Stanyan, 117.) Nor does it obtain in Holland. But it cannot be concluded from hence, that the Swiss, or the Dutch, the jealousy of whom would not suffer them to adopt a national government, would deem it an abasement, to summon a state, connected as the United States are, before a national tribunal. But our anxiety for precedents is relieved by appealing to the Germanic Empire. The jumble of fifty principalities together, no more deserves *the name of one body, than the incoherent parts of Nebuchadnezzar's image. The princes wage war, [542* without the consent of their paramount sovereign; they even wage war upon each other; nay, upon the emperor himself; after which, it will add but little to say, that they are distinct sovereignties. And yet, both the Imperial Chamber, and the Aulic Council hear and determine the complaints of individuals against the Prince.(*c*)

It will not surely be required to assign a reason, why the confederation did not convey a similar jurisdiction; since that scanty and strict paper was of so different a hue and feature from the constitution, as scarcely to appear the child of the same family.

I hold it, therefore, to be no degradation of sovereignty, in the states, to submit to the supreme judiciary of the United States. At the same time, by way of anticipating an objection, I assert, that it will not follow, from these premises, that the United States themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminences. We have, indeed, known petitions of right, *monstrans de droit*, and even process in the exchequer. But the first is in the style of entreaty; the second, being apparent upon the record, is so far a deduction from the royal title; the third, as in the *Banker's case*, in the 11th volume of the State Trials, is applicable only, where the charge is claimed against the revenue; and all of them are widely remote from an involuntary subjection of the sovereign to the cognisance of his own courts.

2d. But what, if the high independence of dissevered nations remained

(*a*) See Anacharsis, 3 Vol. p. 300.
(*b*) See Gast's Hist. of Greece, p. 321.
(*c*) See History of Germanic Body, p. 157–8.

uncontrolled among the United States, so far as to place the individual states no more within the sphere of the supreme court, than one independent nation is within the jurisdiction of another? It has been a contest amongst civilians, whether one Prince, found within the territory of another, may be sued for a contract.(*a*) I do not assert the affirmative; but it is allowable to observe, that such a position, once conceded, would illustrate and almost settle the present inquiry. But the same author, who repudiates the former idea, is strenuous in the opinion, that where the effects or property of one Prince are arrested in the dominions of another, the proprietor Prince may be summoned before a tribunal of that other.[1] Now, although, each state has its separate territory, in one sense, the whole is that of the United States, in another. The jurisdiction of this court reaches to Georgia, as well as to Philadelphia. If, therefore, the process could be commenced *in rem*, the authority *of Bynkershoek would justify us; and whether it be com-
*426] menced in *rem*, or in *personam*, the principle of amenability is equally avowed.

3d. Nor will these sentiments be weakened by the want of a special provision in the constitution for an execution; since it is so provided in no case, not even where states are in litigation. This will be more properly arranged under the following head concerning the judicial act.

1. The judicial act recognises the jurisdiction over states. Instead of using the first expression in the constitution, to wit, "controversies *between*, &c.," it adopts the second, namely, "where a state shall be a party." Thus, it makes no distinction between a state as plaintiff, or as defendant: but evidently comprehends in the word "*party*" a state, as defendant, in one case, at least, where a state is opposed to a state. This, after what has been said, need not be further pressed.

2. The master objection is, that the law has prescribed no execution against a state; that none can be formed with propriety; and that, therefore, a judgment against a state must be abortive. It is true, that no express execution is given by the judicial act, or the process act. But has it ever been insinuated, that a dispute between two states is not within federal cognisance, because no execution is marked out? Or, that for a like reason, the court, given by the confederation, could not proceed?

The supreme court are either vested with authority by the judicial act, to form an execution, or possess it, as incidental to their jurisdiction. By the 14th section of the judicial act, the supreme court, as one of the courts of the United States, has power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. Executions for one state against another, are writs not specially provided for by statute, and are necessary for the exercise of the jurisdiction of the supreme court, in a contest between states; and although, in neither the common law, nor any statute, the form of such an execution appears; yet, is it agreeable to the principles and usages of law, that there should be a mode of carrying into force a jurisdiction which is

(*a*) See Bynk. c. 3, 4.

[1] But see Nathan *v.* Virginia, *ante*, p. 77, in note.

not denied. If, then, the supreme court may create a mode of execution, when a state is defeated at law, by a state, why may not the same means be exerted, where an *individual* is successful against a state?

Again, the process act, which dictates the modes of execution to the other courts, is silent as to the supreme court; it must, therefore, be either wholly without executions, or derive them from the foregoing section of the judicial act, or adopt them, on the ground of incidental *power. The total negation of execution is obviously inadmissible; and the construction of [*427 the judicial act, which has been just insisted on, would be sufficiently efficacious. But why may not executions even spring from the will of the supreme court, as the writs of *fieri facias*, *levari facias* and *distringas* were originally the creation of courts? Such an incidental authority is not of a higher tone than that of fine and imprisonment, which belongs to every court of record, without a particular grant of it.

But what species of execution can be devised? This, though, a difficult task, is not impracticable. And if it were incumbent on me to anticipate the measures of the court, I would suggest these outlines of conduct. First, that if the judgment be for the specific thing, it may be seized: or, secondly, if for damages, such property may be taken, as, upon the principles, and under the circumstances cited from Bynkershoek, would be the ground-work of jurisdiction over a foreign prince. However, it is of no consequence, whether the conjectures be accurate or not; as a correct plan can doubtless be discovered.

Still, we may be pressed with the final question: "What if the state is resolved to oppose the execution?" This would be an awful question indeed! He, to whose lot it should fall to solve it, would be impelled to invoke the God of wisdom to illuminate his decision. I will not believe, that he would recall the tremendous examples of vengeance, which in past days have been inflicted by those who claim, against those who violate, authority. I will not believe that in the wide and gloomy theatre, over which his eye should roll, he might perchance catch a distant glimpse of the federal arm uplifted. Scenes like these are too full of horror, not to agitate, not to rack, the imagination. But at last, we must settle on this result; there are many *duties*, precisely defined, which the states must perform. Let the remedy which is to be administered, if these should be disobeyed, be the remedy on the occasion which we contemplate. The argument requires no more to be said; it surely does not requires us to dwell on such painful possibilities. Rather, let me hope and pray, that not a single star in the American constellation will ever suffer its lustre to be diminished, by hostility against the sentence of a court, which itself has adopted.

But, after all, although no mode of execution should be invented, why shall not the court proceed to judgment? It is well known, that the courts of some states have been directed to render judgment, and there stop; and that the chancery has often tied up the hands of the common law, in a like manner. Perhaps, if a government could be constituted, without mingling at all the three orders of power, courts should, in *strict theory, only [*428 declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the executive. But that any state should refuse to conform to a solemn determina-

tion of the supreme court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact, and character.

Combine then into one view, the letter and the spirit of the constitution; the relation of the several states to the Union of the states; the precedents from other sovereignties; the judicial act, and process act; the power of forming executions; the little previous importance of this power to that of rendering of judgment; the influence under which every state must be to maintain the general harmony; and the inference, wili, I trust, be in favor of the first proposition; namely, that a state may be sued by the citizens of another state.

II. The next question is, whether an action of *assumpsit* will lie against a state? I acknowledge, that it does not follow, from a state being suable in some actions, that she is liable in every action. But that of *assumpsit* is of all others most free from cavil. Is not a state capable of making a promise? Certainly; as a state is a moral person, being an assemblage of individuals, who are moral persons. Vatt. lib. 1, § 2. On this ground, treaties and other compacts, are daily concluded between nations. On this ground, the United States and the particular states have moved, during and since the war. On this ground, the constitution transmitted from the old to the new government all the obligations of the former. Without it, every government must stagnate. But I shall enter into this matter no further, as it is open for discussion in almost every stage of the cause.

III. I affirm, in the third place, that the service of the summons on the governor and attorney-general, is a competent service. The service of process is solely for the purpose of notice to prepare for defence. The mode, if it be not otherwise prescribed by law, or long usage, is in the discretion of the court; and here that discretion must operate. The defence must rest either upon the three branches of government collectively, or one of them. But as the judiciary are manifestly disjoined from such an office, and the legislative are only to provide funds to answer damages, the practice of considering the executive, as the ostensible representative of a state, devolves upon it this function. In the instance of Georgia, her constitution establishes the governor as the channel of communication with the legislature; he is bound by oath to *defend* her; and he has instituted a suit, now depending in this court, in her behalf, against Brailsford and others. It was supererogation to serve *the process on the attorney-general; although this has satisfied even etiquette itself, by notifying the officer who is the instrument of defence. *429]

IV. As to the steps proper for compelling an appearance; these too, not being dictated by law, are in the breast of the court. I banish the comparison of states with corporations; and therefore, search for no resemblance in them. I prefer the scheme contained in the motion; because it tempers with moderation the preliminary measures; and postpones embarrassments, at any rate, until the close of the business. It is unnecessary to spend time on this head; as the mode is to me absolutely indifferent, if it be effectual, and respectful.

With this discussion, though purely legal, it will be impossible to prevent the world from blending political considerations. Some may call this an attempt to consolidate. But before such an imputation shall be pronounced, let them examine well, if the fair interpretation of the constitution

does not vindicate my opinions. Above all, let me personally assure them, that the prostration of state-rights is no object with me; but that I remain in perfect confidence, that with the power, which the people and the legislatures of the states indirectly hold over almost every movement of the national government, the states need not fear an assault from bold ambition, nor any approaches of covered stratagem.

The Court held the case under advisement, from the 5th to the 18th of February, when they delivered their opinions *seriatim.*

IREDELL, Justice.—This great cause comes before the court, on a motion made by the attorney-general, that an order be made by the court to the following effect: "That unless the state of Georgia shall, after reasonable notice of this motion, cause an appearance to be entered on behalf of the said state, on the fourth day of next term, or show cause to the contrary, judgment shall be entered for the plaintiff, and a writ of inquiry shall be awarded." Before such an order be made, it is proper that this court should be satisfied it hath cognisance of the suit; for, to be sure, we ought not to enter a conditional judgment (which this would be), in a case where we were not fully persuaded we had authority to do so.

This is the first instance wherein the important question involved in this cause has come regularly before the court. In the Maryland case, it did not, because the attorney-general of the state voluntarily appeared. We could not, therefore, without the greatest impropriety, have taken up the question suddenly. That case has since been compromised; but had it proceeded to trial, and a verdict been given for the plaintiff, it would have been our duty, previous to our giving judgment, to have well *considered whether we were warranted in giving it. I had then great doubts upon my [*430 mind, and should, on such a case, have proposed a discussion of the subject. Those doubts have increased since, and after the fullest consideration I have been able to bestow on the subject, and the most respectful attention to the able argument of the attorney-general, I am now decidedly of opinion, that no such action as this before the court can legally be maintained.

The action is an action of *assumpsit.* The particular question then before the court, is, will an action of *assumpsit* lie against a state? This particular question (abstracted from the general one, viz., whether, a state can in any instance be sued?) I took the liberty to propose to the consideration of lhe attorney-general, last term. I did so, because I have often found a great deal of confusion to arise from taking too large a view at once, and I had found myself embarrassed on this very subject, until I considered the abstract question itself. The attorney-general has spoken to it, in deference to my request, as he has been pleased to intimate, but he spoke to this particular question slightly, conceiving it to be involved in the general one; and after establishing, as he thought, that point, he seemed to consider the other followed of course. He expressed, indeed, some doubt how to prove what appeared so plain. It seemed to him (if I recollect right), to depend principally on the solution of this simple question; can a state assume? But the attorney-general must know, that in England, certain judicial proceedings, not inconsistent with the sovereignty, may take place against the crown, but that an action of *assumpsit* will not lie. Yet, surely, the King can assume as well as a state. So can the United States themselves, as well as

any state in the Union: yet, the attorney-general himself has taken some pains to show, that no action whatever is maintainable against the United States. I shall, therefore, confine myself, as much as possible, to the particular question before the court, though every thing I have to say upon it will effect every kind of suit, the object of which is to compel the payment of money by a state.

The question, as I before observed, is—will an action of *assumpsit* lie against a state? If it will, it must be in virtue of the constitution of the United States, and of some law of congress conformable thereto. The part of the constitution concerning the judicial power, is as follows, viz: Art. III., § 2. The judicial power shall extend, (1) To all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority: (2) To all cases affecting ambassadors, or other public ministers and consuls: (3) To all cases of admiralty and maritime jurisdiction: (4) To all controversies to *431] which the *United States shall be a party: (5) To controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens or subjects. The constitution, therefore, provides for the jurisdiction wherein a state is a party, in the following instances: 1st. Controversies between two or more states: 2d. Controversies between a state and citizens of another state: 3d. Controversies between a state, and foreign states, citizens or subjects. And it also provides, that in all cases in which a state shall be a party, the supreme court shall have original jurisdiction.

The words of the general judicial act, conveying the authority of the supreme court, under the constitution, so far as they concern this question, are as follows: § 13. "That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens, in which latter case, it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party."

The supreme court hath, therefore, *first*, exclusive jurisdiction in every controversy of a civil nature: 1st. Between two or more states: 2d. Between a state and a foreign state: 3d. Where a suit or proceeding is depending against ambassadors, other public ministers, or their domestics or domestic servants. *Second*, original, but not exclusive jurisdiction, 1st. Between a state and citizens of other states: 2d. Between a state and foreign citizens or subjects: 3d. Where a suit is brought by ambassadors or other public ministers: 4th. Where a consul or vice-consul is a party. The suit now before the court (if maintainable at all) comes within the latter description, it being a suit against a state by a citizen of another state.

The constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but in respect to the subject-

matter upon which such jurisdiction is to be exercised, used the word "controversies" only. The act of congress more particularly mentions civil controversies, a qualification of the general word in the constitution, which I do not doubt every reasonable man will think well warranted, for it *cannot be presumed, that the general word "controversies" was [*432 intended to include any proceedings that relate to criminal cases, which in all instances that respect the same governor only, are uniformly considered of a local nature, and to be decided by its particular laws. The word "controversy" indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in congress to guard against the possibility of it.

A general question of great importance here occurs. What controversy of a civil nature can be maintained against a state by an individual? The framers of the constitution, I presume, must have meant one of two things—Either, 1. In the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the constitution itself), to refer to antecedent laws for the construction of the general words they use: or, 2. To enable congress in all such cases to pass all such laws as they might deem necessary and proper to carry the purposes of this constitution into full effect, either absolutely at their discretion, or, at least, in cases where prior laws were deficient for such purposes, if any such deficiency existed.

The attorney-general has indeed suggested another construction, a construction, I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation, though it appeared to me to be the basis of the attorney-general's argument. His construction I take to be this: "That the moment a supreme court is formed, it is to exercise all the judicial power vested in it by the constitution, by its own authority, whether the legislature has prescribed methods of doing so, or not." My conception of the constitution is entirely different. I conceive, that all the courts of the United States must receive, not merely their *organization* as to the number of judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the legislature only. This appears to me to be one of those cases, with many others, in which an article of the constitution cannot be effectuated, without the intervention of the legislative authority. There being many such, at the end of the special enumeration of the powers of congress in the constitution, is this general one: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." None will deny, that an act of legislation is necessary to say, at least, of what number the judges are to consist; the President, with the consent of the senate, could not nominate a number at their *discretion. The [*433 constitution intended this article so far, at least, to be the subject of a legislative act. Having a right thus to establish the court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings. Upon this authority, there is, that I know, but one limit; that is, "that they shall not exceed their authority." If they do, I have no hesitation to say, that

any act to that effect would be utterly void, because it would be inconsistent with the constitution, which is a fundamental law, paramount to all others, which we are not only bound to consult, but sworn to observe; and therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference. Subject to this restriction, the whole business of organizing the courts, and directing the methods of their proceeding, where necessary, I conceive to be in the discretion of congress. If it shall be found, on this occasion, or on any other, that the remedies now in being are defective, for any purpose, it is their duty to provide for, they no doubt will provide others. It is their duty to *legislate*, so far as is necessary to carry the constitution into effect. It is *ours* only to *judge*. We have no reason, nor any more right to distrust their doing their duty, than they have to distrust that we all do ours. There is no part of the constitution that I know of, that authorizes this court to take up any business where they left it, and in order that the powers given in the constitution may be in full activity, supply their omission by making *new laws* for *new cases;* or, which I take to be the same thing, applying *old principles* to *new cases* materially different from those to which they were applied before.

With regard to the attorney-general's doctrine of incidents, that was founded entirely on the supposition of the other I have been considering. The authority contended for is certainly not one of those necessarily incident to all courts merely as such.

If therefore, this court is to be (as I consider it) the organ of the constitution and the law, not of the *constitution* only, in respect to the manner of its proceeding, we must receive our directions from the legislature in this particular, and have no right to constitute ourselves an *officina brevium*, or take any other short method of doing what the constitution has chosen (and, in my opinion, with the most perfect propriety) should be done, in another manner.

But the act of congress has not been altogether silent upon this subject. The 14th section of the judicial act, provides in the following words: "All the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their *434] respective *jurisdictions, and agreeable to the principles and usages of law." These words refer as well to the supreme court as to the other courts of the United States. Whatever writs we issue, that are necessary for the exercise of our jurisdiction, must be agreeable to the principles and usages of law. This is a direction, I apprehend, we cannot supersede, because it may appear to us not sufficiently extensive. If it be not, we must wait until other remedies are provided by the same authority. From this it is plain, that the legislature did not choose to leave to our own discretion the path to justice, but has prescribed one of its own. In doing so, it has, I think, wisely, referred us to principles and usages of law, already well known, and by their precision calculated to guard against that innovating spirit of courts of justice, which the attorney-general, in another case, reprobated with so much warmth, and with whose sentiments in that particular, I most cordially join. The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the

special words I have above cited, from the judicial act, I apprehend, can be, either, 1st. Those of the particular laws of the state, against which the suit is brought. Or 2d. Principles of law, common to all the states. I omit any consideration arising from the word "usages," though a still stronger expression. In regard to the principles of the particular laws of the state of Georgia, if they in any manner differed, so as to affect this question, from the principles of law, common to all the states, it might be material to inquire, whether, there would be any propriety or congruity in laying down a rule of decision which would induce this consequence, that an action would lie in the supreme court against some states, whose laws admitted of a compulsory remedy against their own governments, but not against others, wherein no such remedy was admitted, or which would require, perhaps, if the principle was received, fifteen different methods of proceeding against states, all standing in the same political relation to the general government, and none having any pretence to a distinction in its favor, or justly liable to any distinction to its prejudice. If any such difference existed in the laws of the different states, there would seem to be a propriety, in order to induce uniformity (if a constitutional power for that purpose exists), that congress should prescribe a rule, fitted to this new case, to which no equal, uniform and impartial mode of proceeding could otherwise be applied.

But this point, I conceive, it is unnecessary to determine, because I believe there is no doubt, that neither in the state now in question, nor in any other in the Union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a state, was in being, either when the constitution *was adopted, or at the time the judicial act was passed. [*435 Since that time, an act of assembly for such a purpose has been passed in Georgia. But that surely could have no influence in the construction of an act of the legislature of the United States, passed before.

The only principles of law, then, that can be regarded, are those common to all the states. I know of none such, which can affect this case, but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work of the laws in every state in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England (unaltered by any statute), at the time of the first settlement of the country. The statutes of England that are in force in America differ perhaps in all the states; and therefore, it is probable, the common law in each is in some respects different. But it is certain, that in regard to any common-law principle which can influence the question before us, no alteration has been made by any statute, which could occasion the least material difference, or have any partial effect. No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered: each state in the Union is sovereign, as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to

them: of course, the part not surrendered must remain as it did before. The powers of the general government, either of a legislative or executive nature, or which particularly concerns treaties with foreign powers, do for the most part (if not wholly) affect individuals, and not states: they require no aid from any state authority. This is the great leading distinction between the old articles of confederation, and the present constitution. The judicial power is of a peculiar kind. It is indeed commensurate with the ordinary legislative and executive powers of the general government, and the power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such *subjects of controversy, and the legislature of the *436] United States may pass all laws necessary to give such judicial authority its proper effect. So far as states, under the constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a state is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a state *can* be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by a reference either to pre-existent laws, or laws passed under the constitution and in conformity to it.

Whatever be the true construction of the constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the legislature to provide laws for the decision of all possible controversies in which a state may be involved with an individual, without regard to any prior exemption; yet it is certain, that the legislature has in fact proceeded upon the former supposition, and not upon the latter. For, besides what I noticed before, as to an express reference to principles and usages of law, as the guide of our proceeding, it is observable, that in instances like this before the court, this court hath a *concurrent jurisdiction* only; the present being one of those cases where, by the judicial act, this court hath *original* but not *exclusive* jurisdiction. This court, therefore, under that act, can exercise no authority, in such instances, but such authority as, from the subject-matter of it, may be exercised in some other court. There are no courts with which such a concurrence can be suggested but the circuit courts, or courts of the different states. With the former, it cannot be, for admitting that the constitution is not to have a restrictive operation, so as to confine all cases in which a state is a party, exclusively to the supreme court (an opinion to which I am strongly inclined), yet, there are no words in the definition of the powers of the circuit court, which give a color to an opinion, that where a suit is brought against a state, by a citizen of another state, the circuit court could exercise any jurisdiction at all. . If they could, however, such a jurisdiction, by the very terms of their authority, could be only concurrent with the courts of the several states. It follows, therefore, unquestionably, I think, that look

ing at the act of congress, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally enacted), we can exercise no authority, in the present instance, *consistently with the clear intention of the act, but such as a proper state court would have been, at least, competent to exercise, at the time the act was passed. [*437

If, therefore, no new remedy be provided (as plainly is the case), and consequently, we have no other rule to govern us, but the principles of the pre-existent laws, which must remain in force until superseded by others, then it is incumbent upon us to inquire, whether, previous to the adoption of the constitution (which period, or the period of passing the law, in respect to the object of this inquiry, is perfectly equal), an action of the nature like this before the court could have been maintained against one of the states in the Union, upon the principles of the common law, which I have shown to be alone applicable. If it could, I think, it is now maintainable here: if it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the constitution as to the power of congress to authorize such a one. Now, I presume, it will not be denied, that in every state in the Union, previous to the adoption of the constitution, the only common-law principles in regard to suits that were in any manner admissible in respect to claims against the state, were those which, in England, apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this constitution, could, in any manner, or upon any color, apply to the case of a claim against a state, in its own courts, where it was solely and completely sovereign, in respect to such cases, at least. Whether that remedy was strictly applicable or not, still, I apprehend, there was no other. The only remedy, in a case like that before the court, by which, by any possibility, a suit can be maintaineda gainst the crown, in England, or, at any period from which the common law, as in force in America, could be derived, I believe, is that which is called a *Petition of right*. It is stated, indeed, in Com. Dig. 105, that "until the time of Edward I., the King might have been sued in all actions, as a common person." And some authorities are cited for that position, though it is even there stated as a doubt. But the same authority adds—"but now, none can have an action against the King, but one shall be put to sue to him by petition." This appears to be a quotation or abstract from Theloall's Digest, which is also one of the authorities quoted in the former case. And this book appears (from the law catalogue) to have been printed so long ago as the year 1579. The same doctrine appears (according to a quotation in Blackstone's Commentaries, 1 vol. 243) to be stated in Finch's Law 253, the first edition of which, it seems, was published in 1579. This also more fully appears in the case of *The Bankers*, and particularly from the celebrated argument of *Somers, in the time of Wm. III., for, though that case was ultimately decided against Lord Somers's opinion, yet, the ground on which the decision was given, no way invalidates the reasoning of that argument, so far as it respects the simple case of a sum of money demandable from the King, and not by him secured on any particular revenues. The case is reported in Freeman, vol. 1, p. 331; 5 Mod. 29; Skin. 601; and lately very elaborately in a small pamphlet published by Mr. Harrgave, which contains all the reports at [*438

length, except Skinner's, together with the argument at large of Lord Somers; besides some additional matter.

The substance of the case was as follows: King Charles II. having received large sums of money from bankers, on the credit of the growing produce of the revenue, for the payment of which, tallies and orders of the exchequer were given (afterwards made transferable by statute), and the payment of these having been afterwards postponed, the King at length, in order to relieve the bankers, in 1677, granted annuities to them out of the hereditary excise, equal to six per cent. interest on their several debts, but redeemable on payment of the principal. This interest was paid until 1683, but it then became in arrear, and continued so at the revolution; and the suits which were commenced to enforce the payment of these arrears, were the subject of this case. The bankers presented a petition to the barons of the exchequer, for the payment of the arrears of the annuities granted; to which petition the attorney-general demurred. Two points were made: First, whether the grant out of the excise was good; second, whether a petition to the barons of the exchequer was a proper remedy. On the first point, the whole court agreed, that, in general, the King could alienate the revenues of the crown; but Mr. Baron Lechmere differed from the other barons, by thinking that this particular revenue of the excise, was an exception to the general rule. But all agreed, that the petition was a proper remedy. Judgment was, therefore, given for the petition, by directing payment to the complainants, at the receipt of the exchequer. A writ of error was brought on this judgment, by the attorney-general, in the exchequer-chamber. There, all the judges who argued held the grant out of the excise good. A majority of them, including Lord Chief Justice Holt, also approved of the remedy by petition to the barons. But Lord Chief Justice Treby was of opinion, that the barons of the exchequer were not authorized to make order for payments on the receipt of the exchequer, and therefore, that the remedy by petition to the barons was inapplicable. In this opinion, Lord Somers concurred. A doubt then arose, whether the Lord Chancellor and Lord High Treasurer were at liberty to give judgment, according to their own *opinion, in opposition to that of a majority of the attendant judges; in other words, whether the judges called by the Lord Chancellor and Lord High Treasurer were to be considered as mere assistants to them, without voices. The opinion of the judges being taken on this point, seven against three, held, that the Lord Chancellor and Lord Treasurer were not concluded by the opinions of the judges, and therefore, that the Lord Keeper, in the case in question, there being then no Lord Treasurer, might give judgment according to his own opinion. Lord Somers concurring in this idea, reversed the judgment of the court of exchequer. But the case was afterwards carried by error into parliament, and there the Lords reversed the judgment of the exchequer-chamber, and affirmed that of the exchequer. However, notwithstanding this final decision in favor of the bankers and their creditors, it appears by a subsequent statute, that they were to receive only one-half of their debts; the 12 & 14 *Wm. III.*, after appropriating certain sums out of the hereditary excise for public uses, providing that in lieu of the annuities granted to the bankers and all arrears, the hereditary excise should, after the 26th of December 1601, be charged

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with annual sums equal to an interest of three per cent., until redeemed by payment of one moiety of the principal sums. *Hargrave's Case of the Bankers*, 1, 2, 3.

Upon perusing the whole of this case, these inferences naturally follow: 1st. That admitting the authority of that decision, in its fullest extent, yet, it is an authority only in respect to such cases, where letters-patent from the crown have been granted for the payment of certain sums out of a particular revenue. 2d. That such relief was grantable in the exchequer, upon no other principle than that that court had a right to direct the issues of the exchequer as well after the money was deposited there, as while (in the exchequer language) it was *in transitu*. 3d. That such an authority could not have been exercised by any other court in Westminster Hall, nor by any court, that, from its particular constitution, had no control over the revenues of the kingdom. Lord C. J. Holt, and Lord Somers (though they differed in the main point) both agreed in that case, that the court of King's bench could not send a writ to the treasury. Hargrave's case, 45, 89. Consequently, no such remedy could, under any circumstances, I apprehend, be allowed in any of the American states, in none of which it is presumed any court of justice hath any express authority over the revenues of the state such as has been attributed to the court of exchequer in England.

The observations of Lord Somers, concerning the general remedy by petition to the King, have been extracted and referred to by some of the ablest law characters since; particularly, by *Lord C. Baron Comyns, in his digest. I shall, therefore, extract some of them, as he appears [*440 to have taken uncommon pains to collect all the material learning on the subject; and indeed is said to have expended several hundred pounds in the procuring of records relative to that case. Hargrave's Preface to the Case of the Bankers.

After citing many authorities, Lord Somers proceeds thus: "By all these authorities, and by many others, which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent or annuity, or other charge from the crown; whether it was a rent or annuity, originally granted by the King, or issuing out of lands, which by subsequent title came to be in the King's hands; in all cases, the remedy to come at it was, by petition to the person of the King; and no other method can be shown to have been practised at common law. Indeed, I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy, at common law, is to sue by petition to the person of the King. I say, where the subject comes as a plaintiff. For, as I said before, when, upon a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in the nature of a defendant; and is admitted to interplead in the case, with the King, in defence of his title, which otherwise would be defeated by finding the office. And to show that this was so, I would take notice of several instances. That, in cases of debts owing by the crown, the subject's remedy was by petition, appears by *Aynesham's Case*, Ryley, 251, which is a petition for 19*l.* due for work done at Carnarvon castle. So, Ryley 251, the executors of John Estrateling petition for 132*l.* due to the testator, for

wages. The answer is remarkable; for there is a latitude taken, which will very well agree with the notion that is taken up in this case; *habeant bre. de liberate in canc. thes. et camerar, de* 32*l. in partem solutionis.* So, the case of *Yerward de Galeys*, for 56*l.* Ryley 414. In like manner, in the same book, 253 (33 *Edw. I.*), several parties sue by *petition* for money and goods taken for the King's use; and also for wages due to them; and for debts owing to them by the king. The answer is, *rex ordinavit per concilium thesaurarii et baronum de scaccario, quod satisfiet iis quam citius fieri poterit; ita quod contertos se tenebunt.* And this is an answer given to a petition presented to the king in parliament; and therefore, we have reason to conclude it to be warranted by law. They must be content, and they shall be paid, *quam citius fieri poterit.* The parties, in these cases, first go to the King by petition: it is by him they are sent to the exchequer; and it is by writ under the great seal, that the exchequer is impowered to act. Nor *441] can *any such writ be found (unless in a very few instances, where it is mere matter of account), in which the treasurer is not joined with the barons. So far was it from being taken to be law at that time, that the barons had any original power of paying the King's debts; or of commanding annuities, granted by the King or his progenitors, to be paid, when the person applied to them for such payment. But, perhaps, it may be objected, that it is not to be inferred, because petitions were brought in these cases, that, therefore, it was of necessity, that the subject should pursue that course, and could take no other way. It might be reasonable to require from those who object thus, that they should produce some precedents, at least, of another remedy taken. But I think, there is a good answer to be given to this objection. All these petitions which I have mentioned, are after the Stat. 8 *Edw. I.* (Ryley 442), where notice is taken that the business of parliament is interrupted by a multitude of petitions, which might be redressed by the chancellor and justices. Wherefore, it is thereby enacted, that petitions which touch the seal shall come first to the chancellor; those which touch the exchequer, to the exchequer; and those which touch the justices, or the law of the land, should come to the justices; and if the business be so great, or *fi de grace*, that the chancellor, or others, cannot do them without the King, then the petitions shall be brought before the King, to know his pleasure; so that no petitions come before the King and his council, but by the hands of the chancellor, and other chief ministers; that the King and his council may attend the great affairs of the King's realm, and his sovereign dominions. This law being made; there is reason to conclude, that all petitions brought before the King or parliament, after this time, and answered there, were brought according to the method of this law; and were of the nature of such petitions as ought to be brought before the person of the King. And that petitions did lie for a chattel, as well as for a freehold, does appear, 37 Ass. pl. ii.; Bro. Pet. 17. If tenant by the statute-merchant be ousted, he may have petition, and shall be restored. *Vide* 9 *Hen. IV.*, 4; Bro. Pet. 9; 9 *Hen. VI.*, 21; Bro. Pet. 2. If the subject be ousted of his term, he shall have his petition. 7 *Hen. VII.*, 2. Of a chattel real, a man shall have his petition of right, as of his freehold. 34 *Hen. VI.*, 51; Bro. Pet. 3. A man shall have a petition of right, for goods and chattels, and the King indorses it in the usual form. It is said, indeed, 1 *Hen. VII.*, 3; Bro. Pet. 19, that a petition will not lie on a chattel. And

admitting there was any doubt as to that point, in the present suit, we are in the case of a freehold." Lord Somers's argument in Hargrave's Case of the Bankers, 103–105.

The solitary case, noticed at the conclusion of Lord Somers's argument, "that a petition will not lie of a chattel," certainly * is deserving of no consideration, opposed to so many other instances mentioned, and [*442 unrecognised (as I believe it is) by any other authority, either ancient or modern, whereas, the contrary, it appears to me, has long been received and established law. In Comyn's Dig. 4 vol. 458, it is said, expressly, "suit shall be to the king by petition, for goods as well as for land." He cites Staundf. Prær. 75 *b*, 72 *b*, for his authority, and takes no notice of any authority to the contrary. The same doctrine is also laid down, with equal explicitness, and without noticing any distinction whatever, in Blackstone's Commentaries, 3 vol. 256, where he points out the petition of right as one of the common-law methods of obtaining possession or restitution from the crown, either of real or personal property; and says expressly, the petition of right "is of use, where the King is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself."

I leave out of the argument, from which I have made so long a quotation, everything concerning the restriction on the exchequer, so far as it concerned the case then before the court, as Lord Somers (although more perhaps by weight of authority than reasoning) was overruled in that particular. As to all others, I consider the authorities on which he relied, and his deduction from them, to be unimpeached.

Blackstone, in the first volume of his Commentaries (p. 203), speaking of demands in point of property upon the King, state the general remedy thus: "If any person has, in point of property, a just demand upon the King, he must petition him in his court of chancery, where his chancellor will administer right, as a matter of grace, though not upon compulsion. (For which he cites Finch L. 255.) "And this is exactly consonant to what is laid down by the writers on natural law. A subject, says Puffendorf, so long as he continues a subject, hath no way to oblige his prince to give him his due when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him upon such contract, in his own courts, the action itself proceeds rather upon natural equity than upon the municipal laws. For the end of such action is not to compel the prince to observe the contract, but to persuade him."

It appears, that when a petition to the person of the King is properly presented, the usual way is, for the King to indorse or to underwrite *soit droit fait al partie* (let right be done to the party); upon which, unless attorney-general confesses the suggestion, a commission is issued to inquire into the truth of it; after the return of which, the King's attorney is at liberty to *plead in bar, and the merits shall be determined upon issue [*443 or demurrer, as in suits between subject and subject. If the attorney-general confesses the suggestion, there is no occasion for a commission, his admission of the truth of the facts being equally conclusive, as if they had been found by a jury. See 3 Blackstone's Commentaries, 256; and 4 Com. Dig. 458, and the authorities there cited. Though the above-mentioned

indorsement be the usual one Lord Somers, in the course of his voluminous search, discovered a variety of other answers to what he considered were unquestionable petitions of right, in respect to which he observes: "The truth is, the manner of answering petitions to the person of the King was very various; which variety did sometimes arise from the conclusion of the party's petition; sometimes, from the nature of the thing; and sometimes, from favor to the person; and according as the indorsement was, the party was sent into chancery or the other courts. If the indorsement was general, *soit droit fait al partie*, it must be delivered to the chancellor of England, and then a commission was to go, to find the right of the party, and that being found, so that there was a record for him, thus warranted, he is let in to interplead with the King; but if the indorsement was special, then the proceeding was to be according to the indorsement in any other court. This is fully explained by Staundfort in his treatise of the Prerogative, c. 22. The case Mich. 10 *Hen. IV.*, No. 4, 8, is full as to this matter. The King recovers in a *quare impedit*, by default, against one who was never summoned; the party cannot have a writ of deceit, without a petition. If, then, says the book, he concludes his petition generally "*que le Roy lui face droit*" (that the King will cause right to be done), and the answer be general, it must go into the chancery, that the right may be inquired of by commission; and upon the inquest found, an original writ must be directed to the justices, to examine the deceit, otherwise, the justices before whom the suit was, cannot meddle. But if he conclude his petition especially, that it may please his highness to command his justices to proceed to the examination, and the indorsement be accordingly, *that* had given the justices a jurisdiction. They might, in such case, have proceeded upon the petition, without any commission or any writ to be sued out, the petition and answer indorsed giving a sufficient jurisdiction to the court to which it was directed. And as the book I have mentioned proves this, so many other authorities may be cited." He, accordingly, mentions many other instances, immaterial to be recited here, particularly remarking a very extraordinary difference in the case belonging to the revenue, in regard to which he said, he thought there was not an instance, to be found, where petitions were answered, *soit droit fait aux parties* (let right be done *to the parties). The usual reference appears to have been to the treasurer and barons, commanding them to do justice. Sometimes, a writ under the great seal was directed to be issued to them for that purpose: sometimes, a writ from the chancery directing payment of money immediately, without taking notice of the barons. And other varieties appear to have taken place. See Hargrave's Case of the Bankers, p. 73, *et seq.* But in all cases of petition of right, of whatever nature is the demand, I think it is clear, beyond all doubt, that there must be some indorsement or order of the King himself, to warrant any further proceedings. The remedy, in the language of Blackstone, being a matter of grace and not on compulsion.

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In a very late case in England, this point was incidentally discussed. The case I refer to, is that of *Macbeath* v. *Haldimand*, reported 1 T. R. 172. The action was against the defendant, for goods furnished by the defendant's order, in Canada, when the defendant was governor of Quebec. The defence was, that the plaintiff was employed by the defendant, in his official capacity, and not upon his personal credit, and that the goods being,

therefore, furnished for the use of government, and the defendant not having undertaken personally to pay, he was not liable. The defence was set up at the trial, on the plea of the general issue, and the jury, by Judge BULLER's direction, found a verdict for the defendant. Upon a motion for a new trial, he reported particularly all the facts given in evidence, and said, his opinion had been at the trial, that the plaintiff should be nonsuited; "but the plaintiff's counsel appearing for their client, when he was called, he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him whether, in the event of the defendant not being liable, any other person was, he told them, that was no part of their consideration, but being willing to give them any information, he added, that he was of opinion, that if the plaintiff's demands were just, his proper remedy was by a petition of right to the crown. On which, they found a verdict for the defendant. The rule for granting a new trial was moved for, on the misdirection of two points. 1st. That the defendant had, by his own conduct, made himself liable, which question should have been left to the jury. 2d. That the plaintiff had no remedy against the crown, by a petition of right, on the supposition of which the jury had been induced to give their verdict." "Lord MANSFIELD, Chief Justice, now declared, that the court did not feel it necessary for them to give any opinion on the second ground. His lordship said, that great difference had arisen, since the revolution, with respect to the expenditure of the public money. Before that period, all the public supplies were given to the King, who, in *his individual capacity, contracted for all expenses. [*445 he alone had the disposition of the public money. But since that time, the supplies had been appropriated by parliament to particular purposes, and now, whoever advances money for the public service, trusts to the faith of parliament. That according to the tenor of Lord Somer's argument in the *Banker's case*, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the *Banker's case;* and parliament was afterwards obliged to provide a particular fund for the payment of those debts. Whether, however, this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was necessary to determine; at any rate, if there were a recovery against the crown, application must be made to parliament, and it would come under the head of supplies for the year." The motion was afterwards argued on the other ground (with which I have at present nothing to do), and rejected.

In the old authorities, there does not appear any distinction between debts that might be contracted personally by the King, for his own private use, and such as he contracted in his political capacity, for the service of the kingdom. As he had, however, then, fixed and independent revenues, upon which depended the ordinary support of government, as well as the expenditure for his own private occasions, probably, no material distinction, at that time, existed, or could easily be made. A very important distinction may, however, perhaps, now subsist between the two cases, for the reasons intimated by Lord MANSFIELD; since the whole support of government depends now on parliamentary provisions, and except in the case of the civil list, those for the most part annual.

Thus, it appears, that in England, even in the case of a private debt con-

tracted by the King, in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise there can be no proceeding upon it. If the debts contracted be avowedly for the public uses of government, it is at least doubtful, whether that remedy will lie, and if it will, it remains afterwards in the power of parliament to provide for it, or not, among the current supplies of the year.

Now, let us consider the case of a debt due from a state. None can, I apprehend, be directly claimed but in the following instances. 1st. In case of a contract with the legislature itself. 2d. In case of a contract with the excutive, or any other person, in consequence of an express authority from the legislature. 3d. In case of a contract with the executive, without any special authority. In the first and second cases, the contract is evidently made on the public faith alone. Every man must know that no suit can lie against a legislative body. His only *dependence, therefore, can be, that the legislature, on principles of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the legislature may incur, the case is certainly without remedy in any of the courts of the state. It never was pretended, even in the case of the crown in England, that if any contract was made with parliament or with the crown, by virtue of an authority from parliament, that a petition to the crown would in such case lie. In the third case, a contract with the governor of a state, without any special authority. This case is entirely different from such a contract made with the crown in England. The crown there has very high prerogatives; in many instances, is a kind of trustee for the public interest; in all cases, represents the sovereignty of the kingdom, and is the only authority which can sue or be sued in any manner, on behalf of the kingdom, in any court of justice. A governor of a state is a mere executive officer; his general authority very narrowly limited by the constitution of the state; with no undefined or disputable prerogatives; without power to effect one shilling of the public money, but as he is authorized under the constitution, or by a particular law; having no color to represent the sovereignty of the state, so as to bind it in any manner, to its prejudice, unless specially authorized thereto. And therefore, all who contract with him, do it at their own peril, and are bound to see (or take the consequence of their own indiscretion) that he has strict authority for any contract he makes. Of course, such contract, when so authorized, will come within the description I mentioned, of cases where public faith alone is the ground of relief, and the legislative body, the only one that can afford a remedy, which, from the very nature of it, must be the effect of its discretion, and not of any compulsory process. If, however, any such cases were similar to those which would entitle a party to relief, by petition to the King, in England, that petition being only presentable to him, as he is the sovereign of the kingdom, so far as analogy is to take place, such petition in a state could only be presented to the sovereign power, which surely the governor is not. The only constituted authority to which such an application could, with any propriety, be made, must undoubtedly be the legislature, whose express consent, upon the principle of analogy, would be necessary to any further proceeding. So that this brings us (though by a different route) to the same goal—the discretion and good faith of the legislative body.

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There is no other part of the common law, besides that which I have

considered, which can, by any person, be pretended, in any manner, to apply to this case, but that which concerns corporations. The applicability of this, the attorney-general, with great candor, has expressly waived. But as it may be *urged on other occasions, and as I wish to give the fullest satisfaction, I will say a few words to that doctrine. Suppose, therefore, [*447 it should be objected, that the reasoning I have now used, is not conclusive, because, inasmuch as a state is made subject to the judicial power of congress, its sovereignty must not stand in the way of the proper exercise of that power, and therefore, in all such cases (though in no other), a state can only be considered as a subordinate corporation merely. I answer: 1st. That this construction can only be allowed, at the utmost, upon the supposition that the judicial authority of the United States, as it respects states, cannot be effectuated, without proceeding against them in that light: a position, I by no means admit. 2d. That according to the principles I have supported in this argument, admitting that states ought to be so considered for that purpose, an act of the legislature is necessary to give effect to such a construction, unless the old doctrine concerning corporations will naturally apply to this particular case. 3d. That as it is evident, the act of congress has not made any special provision in this case, grounded on any such construction, so it is to my mind perfectly clear, that we have no authority, upon any supposed analogy between the two cases, to apply the common doctrine concerning corporations, to the important case now before the court. I take it for granted, that when any part of an ancient law is to be applied to a new case, the circumstances of the new case must agree in all essential points with the circumstances of the old cases to which that ancient law was formerly appropriated. Now, there are, in my opinion, the most essential differences between the old cases of corporations, to which the law intimated has reference, and the great and extraordinary case of states separately possessing, as to everything simply relating to themselves, the fullest powers of sovereignty, and yet, in some other defined particulars, subject to a superior power, composed out of themselves, for the common welfare of the whole. The only law concerning corporations, to which I conceive the least reference is to be had, is the common law of England on that subject. I need not repeat the observations I made in respect to the operation of that law in this country. The word "corporations," in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate), whether its power be restricted or transcendent, is in this sense, "a corporation." The king, accordingly, in England, is called a corporation. 10 Co. 29 *b*. So also, by a very respectable author (Sheppard, in his Abridgement, 1 vol. 431), is the parliament itself. In this extensive sense, not only each state singly, but even the United States may, without impropriety, be termed "corporations." I have, therefore, in contradistinction to this large and indefinite *term, used the term [*448 "subordinate corporations," meaning to refer to such only (as alone capable of the slightest application, for the purpose of the objection) whose creation and whose powers are limited by law.

The differences between such corporations, and the several states in the Union, as relative to the general government, are very obvious, in the following particulars. 1st. A corporation is a mere creature of the king, or of parliament; very rarely, of the latter; most usually, of the former only.

It owes its existence, its name, and its laws (except such laws as are necessarily incident to all corporations merely as such), to the authority which create it. A state does not owe its origin to the government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people. 2d. A corporation can do no act but what is subject to the revision either of a court of justice, or of some other authority within the government. A state is altogether exempt from the jurisdiction of the courts of the United States, or from any other exterior authority, unless in the special instances where the general government has power derived from the constitution itself. 3d. A corporation is altogether dependent on that government to which it owes its existence. Its charter may be forfeited by abuse: its authority may be annihilated, without abuse, by an act of the legislative body. A state, though subject, in certain specified particulars, to the authority of the government of the United States, is, in every other respect, totally independent upon it. The people of the state created, the people of the state can only change, its constitution. Upon this power, there is no other limitation but that imposed by the constitution of the United States; that it must be of the republican form. I omit minuter distinctions. These are so palpable, that I never can admit that a system of law, calculated for one of these cases, is to be applied, as a matter of course, to the other, without admitting (as I conceive) that the distinct boundaries of law and legislation may be confounded, in a manner that would make courts arbitrary, and, in effect, makers of a new law, instead of being (as certainly they alone ought to be) expositors of an existing one. If still it should be insisted, that though a state cannot be considered upon the same footing as the municipal corporations I have been considering, yet, as relative to the powers of the general government, it must be deemed in some measure dependent; admitting that to be the case (which to be sure is, so far as the necessary execution of the powers of the general government extends), yet, in whatever character this may place a *449] state, this can only afford a reason for a new law, *calculated to effectuate the powers of the general government in this new case: but it affords no reason whatever for the court admitting a new action to fit a case, to which no old ones apply, when the *application* of law, not the *making* of it, is the sole province of the court.

I have now, I think, established the following particulars. 1st. That the constitution, so far as it respects the judicial authority, can only be carried into effect, by acts of the legislature, appointing courts, and prescribing their methods of proceeding. 2d. That congress has provided no new law in regard to this case, but expressly referred us to the old. 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is, that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.

From the manner in which I have viewed this subject, so different from that in which it has been contemplated by the attorney-general, it is evident, that I have not had occasion to notice many arguments offered by the attorney-general, which certainly were very proper, as to his extended view

of the case, but do not affect mine. No part of the law of nations can apply to this case, as I apprehend, but that part which is termed, "The conventional Law of Nations;" nor can this any otherwise apply, than as furnishing rules of interpretation, since, unquestionably, the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples. If, upon a fair construction of the constitution of the United States, the power contended for really exists, it undoubtedly may be exercised, though it be a power of the first impression. If it does not exist, upon that authority, ten thousand examples of similar powers would not warrant its assumption. So far as this great question affects the constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I would not shrink from its discussion. But it is of extreme moment, that no judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the constitution, that it may not be improper to intimate, that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for the recovery of money. I *think, every word [*450 in the constitution may have its full effect, without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case), would authorize the deduction of so high a power. This opinion, I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. With regard to the policy of maintaining such suits, that is not for this court to consider, unless the point in all other respects was very doubtful. Policy might then be argued from, with a view to preponderate the judgment. Upon the question before us, I have no doubt. I have, therefore, nothing to do with the policy. But I confess, if I was at liberty to speak on that subject, my opinion on the policy of the case would also differ from that of the attorney-general. It is, however, a delicate topic. I pray to God, that if the attorney-general's doctrine, as to the law, be established by the judgment of this court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant.

Blair, Justice.—In considering this important case, I have thought it best to pass over all the strictures which have been made on the various European confederations; because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here. The constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the Union; for no state could have become a member, but by an adoption of it by the people of that state. What then do we find there, requiring the submission of individual states to the judicial authority of the United States? This is expressly extended,

among other things, to controversies between a state and citizens of another state. Is, then, the case before us one of that description? Undoubtedly, it is, unless it may be a sufficient denial to say, that it is a controversy between a citizen of one state and another state. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude, that the jurisdiction of this court reaches the case where a state is plaintiff, but not where it is defendant? In this latter case, should any man be asked, whether it was not a controversy between a state and citizen of another state, must not the answer be in the affirmative? A dispute between A. and B. is surely a dispute between B. and A. Both cases, I have no doubt, were intended; and probably, the state *451] was first named, *in respect to the dignity of a state. But that very dignity seems to have been thought a sufficient reason for confining the sense to the case where a state is plaintiff. It is, however, a sufficient answer to say, that our constitution most certainly contemplates, in another branch of the cases enumerated, the maintaining a jurisdiction against a state, as defendant; this is unequivocally asserted, when the judicial power of the United States is extended to controversies between two or more states; for there, a state must, of necessity, be a defendant. It is extended also to controversies between a state and foreign states; and if the argument taken from the order of designation were good, it would be meant here, that this court might have cognisance of a suit, where a state is plaintiff, and some foreign state a defendant, but not where a foreign state brings a suit against a state. This, however, not to mention that the instances may rarely occur, when a state may have an opportunity of suing, in the American courts, a foreign state, seems to lose sight of the policy which, no doubt, suggested this provision, viz., that no state in the Union should, by withholding justice, have it in its power to embroil the whole confederacy in disputes of another nature. But if a foreign state, though last named, may, nevertheless, be a plaintiff against an individual state, how can it be said, that a controversy between a state and a citizen of another state means, from the mere force of the order of the words, only such cases where a state is plaintiff? After describing, generally, the judicial powers of the United States, the constitution goes on to speak of it distributively, and gives to the supreme court original jurisdiction, among other instances, in the case where a state shall be a *party*; but is not a state a party as well in the condition of a defendant, as in that of a plaintiff? And is the whole force of that expression satisfied, by confining its meaning to the case of a plaintiff-state? It seems to me, that if this court should refuse to hold jurisdiction of a case where a state is defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the constitution; because, it would be a refusal to take cognisance of a case, where a state is a party.

Nor does the jurisdiction of this court, in relation to a state, seem to me to be questionable, on the ground, that congress has not provided any form of execution, or pointed out any mode of making the judgment against a state effectual; the argument *ab inutile* may weigh much, in cases depending upon the construction of doubtful legislative acts, but can have no force, I think, against the clear and positive directions of an act of congress and of the constitution. *452] Let us go on so far as we can; and if, at the end of the business, notwithstanding the powers given us in the 14th section *of the judicial law,

we meet difficulties insurmountable to us, we must leave it to those departments of government which have higher powers; to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation, that a state may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the supreme court of the United States, though not conformable to their own ideas of justice? Besides, this argument takes it for granted, that the judgment of the court will be against the state; it possibly may be in favor of the state: and the difficulty vanishes. Should judgment be given against the plaintiff, could it be said to be void, because extra-judicial? If the plaintiff, grounding himself upon that notion, should renew his suit against the state, in any mode in which she may permit herself to be sued in her own courts, would the attorney-general for the state be obliged to go again into the merits of the case, because the matter, when here, was *coram non judice?* Might he not rely upon the judgment given by this court, in bar of the new suit? To me, it seems clear, that he might. And if a state may be brought before this court, as a defendant, I see no reason for confining the plaintiff to proceed by way of petition; indeed, there would even seem to be an impropriety in proceeding in that mode. When sovereigns are sued in their own courts, such a method may have been established, as the most respectful form of demand; but we are not now in a state court; and if sovereignty be an exemption from suit, in any other than the sovereign's own courts, it follows, that when a state, by adopting the constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.

With respect to the service of the summons to appear, the manner in which it has been served, seems to be as proper as any which could be devised for the purpose of giving notice of the suit, which is the end proposed by it, the governor being the head of the executive department, and the attorney-general the law officer, who generally represents the state in legal proceedings: and this mode is the less liable to exception, when it is considered, that in the suit brought in this court, by the state of *Georgia* against *Brailsford* and others,(*a*) it is conceived in the name of the governor in behalf of the state. If the opinion which I have delivered, respecting the liability of a state to be sued in this court, should be the opinion of the court, it will come, in course, to consider, what is the proper step to be taken for inducing appearance, none having been yet entered in behalf of the defendant. A judgment by default, in the present state of the business, and writ of inquiry for damages, would *be too precipitate in any case, and too incompatible with the dignity of a state in this. Further [*453 opportunity of appearing to defend the suit ought to be given. The conditional order moved for the last term, the consideration of which was deferred to this, seems to me to be a very proper mode; it will warn the state of the meditated consequence of a refusal to appear, and give an opportunity for more deliberate consideration. The order, I think, should be thus: "Ordered, that unless the state of Georgia should, after due notice of this order, by a service thereof upon the governor and attorney-general of the said state, cause an appearance to be entered in behalf of the state, on the

(*a*) *Ante*, p. 402.

5th day of the next term, or then show cause to the contrary, judgment be then entered up against the state, and a writ of inquiry of damages be awarded."

WILSON, Justice—This is a case of uncommon magnitude. One of the parties to it is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others, more important still; and may, perhaps, be ultimately resolved into one, no less *radical* than this—"do the People of the United States form a Nation?"

A cause so conspicuous and interesting, should be carefully and accurately viewed, from every possible point of sight. I shall examine it, 1st. By the principles of general jurisprudence. 2d. By the laws and practice of particular states and kingdoms. From the law of nations, little or no illustration of this subject can be expected. By that law, the several states and governments spread over our globe, are considered as forming a society, not a nation. It has only been by a very few comprehensive minds, such as those of Elizabeth and the Fourth Henry, that this last great idea has been even contemplated. 3d. And chiefly, I shall examine the important question before us, by the constitution of the United States, and the legitimate result of that valuable instrnment.

I. I am first to examine this question by the principles of general jurisprudence. What I shall say upon this head, I introduce, by the observation of an original and profound writer, who, on the philosophy of mind, and all the sciences attendant on this prime one, has formed an era not less remarkable, and far more illustrious, than that formed by the justly celebrated Bacon, in another science, not prosecuted with less ability, but less dignified as to its object; I mean the philosophy of nature. Dr. Reid, in his excellent inquiry into the human mind, on the principles of common sense, speaking of the sceptical and illiberal *philosophy, which, under bold, but false, *454] pretensions to liberality, prevailed in many parts of Europe before he wrote, makes the following judicious remark: "The language of philosophers, with regard to the original faculties of the mind, is so adapted to the prevailing system, that it cannot fit any other; like the coat that fits the man for whom it was made, and shows him to advantage, which yet will fit very awkward upon one of a different make, although as handsome and well proportioned. It is hardly possible to make any innovation in our philosophy concerning the mind and its operations, without using new words and phrases, or giving a different meaning to those that are received." With equal propriety, may this solid remark be applied to the great subject, on the principles of which the decision of this court is to be founded. The perverted use of *genus* and *species* in logic, and of *impressions* and *ideas* in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by *states* and *sovereigns*, in politics and jurisprudence; in the politics and jurisprudence even of those who wished and meant to be free. In the place of those expressions, I intend not to substitute new ones; but the expressions themselves I shall certainly use for purposes different from those, for which hitherto they have been frequently used; and one of them I shall apply to an object still more different from that, to which it

has been hitherto, most frequently, I may say, almost universally, applied. In these purposes, and in this application, I shall be justified by example the most splendid, and by authority the most binding; the example of the most refined as well as the most free nation known to antiquity; and the authority of one of the best constitutions known to modern times. With regard to one of the terms, "state," this authority is declared: with regard to the other, "sovereign," the authority is implied only; but it is equally strong: for, in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive.

To the constitution of the United States the term *sovereign* is totally unknown. There is but one place where it could have been used with propriety. But even in that place, it would not, perhaps, have comported with the delicacy of those who ordained and established that constitution. They might have announced themselves *sovereign* people of the United States: but serenely conscious of the past, they avoided the ostentatious declaration.

Having thus avowed my disapprobation of the purposes for which the terms *state* and *sovereign*, are frequently used, and of the object to which the application of the last of them is almost universally made; it is now proper, that I should disclose the meaning which I assign to both, and the application *which I make of the latter. In doing this, I shall have occasion incidentally to evince, how true it is, that states and governments were made for man; and at the same time, how true it is, that his creatures and servants have first deceived, next vilified, and at last, oppressed their master and maker. [*455

Man, fearfully and wonderfully made, is the workmanship of his all-perfect Creator: a state, useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity, derives all its acquired importance. When I speak of a state, as an inferior contrivance, I mean that it is a contrivance inferior only to that which is divine: Of all human contrivances, it is certainly most transcendently excellent. It is concerning this contrivance, that Cicero says so sublimely, "Nothing which is exhibited upon our globe, is more acceptable to that divinity which governs the whole universe, than those communities and assemblages of men, which, lawfully associated, are denominated states."(*a*)

Let a state be considered as subordinate to the People: but let everything else be subordinate to the state. The latter part of this position is equally necessary with the former. For in the practice, and even, at length, in the science of politics, there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the state has claimed precedence of the people; so, in the same inverted course of things, the government has often claimed precedence of the state; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the sovereigns of the state. This second degree of perversion is confined to the old world, and begins to diminish even there: but the first degree is still too prevalent, even in the several states of which our

(*a*) Som. Sup. c. 8.

Union is composed. By a state, I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: it has its rules: it has its rights: and it has its obligations. It may acquire property, distinct from that of its members: it may incur debts, to be discharged, out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this *feigned and artificial person, we should never forget, *456] that, in truth and nature, those who think and speak and act, are men.

Is the foregoing description of a state, a true description? It will not be questioned, but it is. Is there any part of this description, which intimates, in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended, that there is. If justice is not done; if engagements are not fulfilled; is it, upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper, it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the courts of justice, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each, singly, is undiminished; the dignity of all, jointly, must be unimpaired. A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, wilfully refuses to discharge it: the latter is amenable to a court of justice: upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a *sovereign* state? Surely not. Before a claim, so contrary, in its first appearance, to the general principles of right and equality, be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim, should certainly be well known and authenticated. Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable. To enumerate all, therefore, will not be expected: to take notice of some, will be necessary to the full illustration of the present important cause. In one sense, the term *sovereign* has for its correlative, *subject*. In this sense, the term can receive no application; for it has no object in the constitution of the United States. Under that constitution, there are *citizens*, but no *subjects*. "Citizens of the *United States*." (*a*) "Citizens of another state." "Citizens of different states." "A state or citizen thereof."(*b*) The term *subject* occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet "foreign"(*c*) is prefixed. In this sense, I presume the state of Georgia has no claim upon *her own citizens: in this sense, I am certain, she can have no claim *457] upon the citizens of another state.

(*a*) Art. 1, § 2. (*b*) Art. 3, § 3. (*c*) Art. 3, § 3.

In another sense, according to some writers, (*a*) every state, which governs itself, without any dependence on another power, is a sovereign state. Whether, with regard to her own citizens, this is the case of the state of Georgia; whether those citizens have done, as the individuals of England are said, by their late instructors, to have done, surrendered the supreme power to the state or government, and reserved nothing to themselves; or whether, like the people of other states. and of the United States, the citizens of Georgia have reserved the supreme power in their own hands; and on that supreme power, have made the state dependent, instead of being sovereign; these are questions, to which, as a judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know, the government of that state to be republican; and my short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people. As a judge of this court, I know, and can decide, upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did *not* surrender the supreme or sovereign power to that state; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, Georgia *is not a sovereign state.* If the judicial decision of this case forms one of those purposes; the allegation that Georgia is a sovereign state, is unsupported by the fact. Whether the judicial decision of this cause is, or is not, one of those purposes, is a question which will be examined particularly, in a subsequent part of my argument.

There is a third sense, in which the term sovereign is frequently used, and which it is very material to trace and explain, as it furnishes a basis for what, I presume, to be one of the principal objections against the jurisdiction of this court over the State of Georgia. In this sense, sovereignty is derived from a feudal source; and like many other parts of that system, so degrading to man, still retains it influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American states. The accurate and well informed President Henault, in his excellent chronological abridgment of the History of France, tells us, that, about the end of the second race of Kings, a new kind of possession was acquired, under the name of fief. The governors of cities and provinces usurped equally the property of land, *and the administratson of justice; and established themselves as proprietary seigniors over [*458 those places in which they had been only civil magistrates or military officers. By this means, there was introduced into the state a new kind of authority, to which was assigned the appellation of sovereignty (*b*). In process of time, the feudal system was extended over France, and almost all the other nations of Europe; and every kingdom became, in fact, a large fief. Into England, this system was introduced by the conqueror; and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of justice. But in the case of the King, the sovereignty had a double operation. While it vested him him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him,

(*a*) Vatt. lib. 1, § 4. (*b*) Henault 118.

there was no superior power; and consequently, on feudal principles, no right of jurisdiction. "The law," says Sir William Blackstone, (a) ascribes to the King, the attribute of sovereignty: he is sovereign and independent, within his own dominions; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the King, even in civil matters; because no court can have jurisdiction over him: for all jurisdiction implies superiority of power." This last position is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care. Of this plan, the author of the Commentaries was, if not the introducer, at least, the great supporter. He has been followed in it, by writers later and less known; and his doctrines have, both on the other and this side of the Atlantic, been implicitly and generally received by those, who neither examined their principles nor their consequences. The principle is, that all human law must be prescribed by a superior: this principle I mean not now to examine: suffice it, at present, to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the *consent* of those whose obedience they require. The sovereign, when traced to his source, must be found in the man.

I have now fixed, in the scale of things, the grade of a state; and have described its composure: I have considered the nature of sovereignty; and pointed its application to the proper object. I have examined the question before us, by the principles of general jurisprudence. In those principles, I find nothing, which tends to evince an exemption of the State of Georgia, from the jurisdiction of the court. I find everything to have a contrary tendency.

*II. I am, in the second place, to examine this question by the laws and *459] practice of different states and kingdoms. In ancient Greece, as we learn from Isocrates, whole nations defended their rights before crowded tribunals. Such occasions as these excited, we are told, all the powers of persuasion; and the vehemence and enthusiasm of the sentiment was gradually infused into the Grecian language, equally susceptible of strength and harmony. In those days, law, liberty and refining science made their benign progress in strict and graceful union; the rude and degrading league between the bar and feudal barbarism was not yet formed.

When the laws and practice of particular states have any application to the question before us, that application will furnish what is called an argument *à fortiori;* because all the instances produced will be instances of subjects instituting and supporting suits against those who were deemed their own sovereigns. These instances are stronger than the present one, because between the present plaintiff and defendant, no such unequal relation is alleged to exist.

Columbus achieved the discovery of that country which, perhaps, ought to bear his name. A contract made by Columbus furnished the first precedent for supporting, in his discovered country, the cause of injured merit against the claims and pretensions of haughty and ungrateful power. His

(a) 1 Bl. Com. 241, 242.

son Don Diego wasted two years in incessant, but fruitless, solicitation at the Court of Spain, for the rights which descended to him, in consequence of his father's original capitulation. He endeavored, at length, to obtain, by a legal sentence, what he could not procure from the favor of an interested monarch. He commenced a suit against Ferdinand, before the Council which managed Indian affairs, and that court, with integrity which reflects honor on its proceedings, decided against the King, and sustained Don Diego's claim.(*a*)

Other states have instituted officers to judge the proceedings of their Kings. Of this kind, were the Ephori of Sparta; of this kind also, was the mayor of the palace, and afterwards, the constable of France.(*b*)

But of all the laws and institutions relating to the present question, none is so striking as that described by the famous Hottoman, in his book entitled Franco Gallia. When the Spaniards of Arragon elect a King, they represent a kind of play, and introduce a personage whom they dignify by the name of Law, *la Justiza*, of Arragon. This person they declare, by a public decree, to be greater and more powerful than their king, and then address him in the following remarkable expressions: "We, who are of as great worth as you, and can do more *than you can do, elect you to be our King, upon the conditions stipulated. But between you and us, there is one of greater authority than you."(*c*) [*460

In England, according to Sir William Blackstone, no suit can be brought against the King, even in civil matters. So, in that kingdom, is the law at this time received. But it was not always so. Under the Saxon government, a very different doctrine was held to be orthodox. Under that government, as we are informed by the Mirror of Justice, a book said by Sir Edward Coke, to have been written, in part, at least, before the conquest; under that government, it was ordained, that the King's court should be open to all plaintiffs, by which, without delay, they should have remedial writs, as well against the King or against the Queen, as against any other of the people.(*d*) The law continued to be the same, for some centuries after the conquest. Until the time of Edward I., the King might have been sued as a common person. The form of the process was even imperative. "*Præcipe Henrico Regi Angliæ*,"&c. "Command Henry, King of England," &c.(*e*) Bracton, who wrote in the time of Henry III., uses these very remarkable expressions concerning the King: "*In justitia recipienda, minimo de regno suo comparetur*"—in receiving justice, he should be placed on a level with the meanest person in the kingdom.(*f*) True it is, that now, in England, the King must be sued in his courts, by petition; but even now, the difference is only in the form, not in the thing. The judgments or decrees of those courts will substantially be the same upon a precatory as upon a mandatory process. In the courts of justice, says the very able author of the considerations on the laws of forfeiture, the King enjoys many privileges; yet not to deter the subject from contending with him freely.(*g*) The judge of the high court of admiralty, in England, made, in a very late cause, the following manly and indepdenent declaration: "In any case, where the crown is a

(*a*) R. A. 231.
(*b*) 1 Sid. 131.
(*c*) Hol. 71, b. 81.
(*d*) 4 C. A. N. 480.
(*e*) Com. 104.
(*f*) Bract. 107; Com. 104.
(*g*) G. F. 124.

party, it is to be observed, that the crown can no more withhold evidence of documents in its possession that a private person. If the court thinks proper to order the production of any public instrument, that order must be obeyed. It wants no *insignia* of an authority derived from the crown."(*a*)

"Judges ought to know, that the poorest peasant is a man, as well as the king himself: all men ought to obtain justice, since, in the estimation of justice, all men are equal, whether the prince complain of a peasant, or a peasant complain of the prince."(*b*) These are the words of a king, of the late Frederic of Prussia. In his courts of justice, that great man stood *461] *upon his native greatness, and disdained to mount upon the artificial stilts of sovereignty.

Thus much concerning the laws and practice of other states and kingdoms. We see nothing against, but much in favor of, the jurisdiction of this court over the state of Georgia, a party to this cause.

III. I am, thirdly, and chiefly, to examine the important question now before us, by the constitution of the United States, and the legitimate result of that valuable instrument. Under this view, the question is naturally subdivided into two others. 1. Could the constitution of the United States vest a jurisdiction over the state of Georgia? 2. Has that constitution vested such jurisdiction in this court? I have already remarked, that in the practice, and even in the science of politics, there has been frequently a strong current against the natural order of things; and an inconsiderate or an interested disposition to sacrifice the end to the means. This remark deserves a more particular illustration. Even in almost every nation which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it: hence, the haughty notions of state independence, state sovereignty, and state supremacy. In despotic governments, the government has usurped, in a similar manner, both upon the state and the people: hence, all arbitrary doctrines and pretensions concerning the supreme, absolute, and uncontrollable power of government. In each, man is degraded from the prime rank, which he ought to hold in human affairs: in the latter, the state as well as the man is degraded. Of both degradations, striking instances occur in history, in politics, and in common life. One of them is drawn from an anecdote, which is recorded concerning Louis XIV., who has been styled the Grand Monarch of France. This prince, who diffused around him so much dazzling splendor, and so little vivifying heat, was vitiated by that inverted manner of teaching and of thinking, which forms kings to be tyrants, without knowing or even suspecting that they are so. The oppression under which he held his subjects, during the whole course of his long reign, proceeded chiefly from the principles and habits of his erroneous education. By these, he had been accustomed to consider his kingdom as his patrimony, and his power over his subjects as his rightful and undelegated inheritance. These sentiments were so deeply and strongly imprinted on his mind, that when one of his ministers represented to him the miserable condition, to which those subjects were reduced, and in the course of his representation, frequently used the word *L'Etat*, the state, the King, though he felt the truth and approved the substance of all that was said, yet was shocked at the frequent repetition of

(*a*) Col. Jur. 68. (*b*) War. 343

the expression *L'Etat;* and *complained of it as an indecency offered to his person and character. And, indeed, that kings should imagine themselves the final causes, for which men were made, and societies were formed, and governments were instituted, will cease to be a matter of wonder or surprise, when we find, that lawyers and statesmen and philosophers have taught or favored principles which necessarily lead to the same conclusion. Another instance, equally strong, but still more astonishing, is drawn from the British government, as described by Sir William Blackstone and his followers. As described by him and them, the British is a despotic government. It is a government without a people. In that government, as so described, the sovereignty is possessed by the parliament: in the parliament, therefore, the supreme and absolute authority is vested: (*a*) in the parliament resides that uncontrollable and despotic power, which, in all governments, must reside somewhere. The constituent parts of the parliament are the King's Majesty, the Lords spiritual, the Lords temporal, and the Commons. The King and these three estates together form the great corporation or body politic of the kingdom. All these sentiments are found; the last expresssons are found *verbatim*, (*b*) in the Commentaries upon the Laws of England.(*c*) The parliament form the great body politic of England! What, then, or where, are the people? Nothing! Nowhere! They are not so much as even the "baseless fabric of a vision!" From legal contemplation, they totally disappear! Am I not warranted in saying that, if this is a just description, a government, so and justly so described, is a despotic government? Whether this description is or is not a just one, is a question of very different import.

In the United States, and in the several states which compose the Union, we go not so far: but still, we go one step farther than we ought to go, in this unnatural and inverted order of things. The states, rather than the *people*, for whose sakes the states exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has prodnced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the United States. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? "The United States," instead of the "People of the United States," is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union: it presents only the second: it presents only the artificial person, instead of the natural persons, who spoke it into existence. A *state*, I cheerfully *admit, is the noblest work of man: but man himself, free and honest, is, I speak as to this [*463 world, the noblest work of God!

Concerning the prerogative of Kings, and concerning the sovereignty of states, much has been said and written; but little has been said and written, concerning a subject much more dignified and important, the majesty of the people. The mode of expression, which I would substitute in the place of that generally used, is not only politically, but also (for between true liberty and true taste there is a close alliance) classically, more correct. On the mention of Athens, a thousand refined and endearing associations

(*a*) 1 Bl. Com. 46–52, 147, 160–62. (*b*) Ibid. 158. (*c*) Ibid. 158.

rush at once into the memory of the scholar, the philosopher, and the patriot. When Homer, one of the most correct, as well as the oldest of human authorities, enumerates the other nations of Greece, whose forces acted at the siege of Troy, he arranges them under the names of their different Kings or Princes: but when he comes to the Athenians, he distinguishes them by the peculiar appellation of the People(*a*) of Athens. The well-known address used by Demosthenes, when he harangued and animated his assembled countrymen, was "O! men of Athens." With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object, which the nation could present: "The People of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen states, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several states terminated its legislative authority: executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquility, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution, legislative power is vested, executive power is vested, judicial power is vested.

The question now opens fairly to our view, could the people of those states, among whom were those of Georgia, bind those states, and Georgia, among the others, by the legislative, executive, and judicial power so vested? If the principles on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer. If those states were the work of those people; those people, and, that I may apply the case closely, the people of Georgia, in particular, *could alter, as they pleased, their former work: to any given degree, they could *diminish* as well as enlarge it: any or all of the former state-powers, they could extinguish or transfer. The inference, which necessarily results, is, that the constitution ordained and established by those people; and, still closely to apply the case, in particular, by the people of Georgia, could vest jurisdiction or judicial power over those states, and over the state of Georgia in particular.

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The next question under this head is—has the constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the United States intended to bind those states by the judicial power vested by the national constitution, a previous inquiry will naturally be: Did those people intend to bind those states by the legislative power vested by that constitution? The articles of confederation, it is well known, did not operate upon individual citizens, but operated only upon states. This defect was remedied by the national constitution, which, as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced

(*a*) Iliad, L, 2, *v.* 54. Δημος, Pol. 12, one of the words of which democracy is compounded.

on the other: for they seem to think, that the present constitution operates only on individual citizens, and not on states. This opinion, however, appears to be altogether unfounded. When certain laws of the states are declared to be "subject to the revision and control of the congress;"(a) it cannot, surely, be contended, that the legislative power of the national government was meant to have no operation on the several states. The fact, uncontrovertibly established in one instance, proves the principle in all other instances, to which the facts will be found to apply. We may then infer, that the people of the United States intended to bind the several states, by the legislative power of the national government.

In order to make the discovery, at which we ultimately aim, a second previous inquiry will naturally be—Did the people of the United States intend to bind the several states, by the executive power of the national government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. Ever since the time of Bracton, his maxim, I believe, has been deemed a good one—"*Supervacuum esset, leges condere, nisi esset qui leges tueretur.*"(b) (It would be superfluous to make laws, unless those laws, when made, were to be enforced.) When the laws are plain, and the application of them is uncontroverted, they are enforced immediately by the *executive authority of government. When the application of them [*465 is doubtful or intricate, the interposition of the judicial authority becomes necessary. The same principle, therefore, which directed us from the first to the second step, will direct us from the second to the third and last step of our deduction. Fair and conclusive deduction, then, evinces that the people of the United States did vest this court with jurisdiction over the state of Georgia. The same truth may be deduced from the declared objects, and the general texture of the constitution of the United States. One of its declared objects is, to form an union more perfect than, before that time, had been formed. Before that time, the Union possessed legislative, but unenforced legislative power over the states. Nothing could be more natural than to intend that this legislative power should be enforced by powers executive and judicial. Another declared object is, "to establish justice." This points, in a particular manner, to the judicial authority. And when we view this object, in conjunction with the declaration, "that no state shall pass a law impairing the obligation of contracts;" we shall probably think, that this object points, in a particular manner, to the jurisdiction of the court over the several states. What good purpose could this constitutional provision secure, if a state might pass a law, impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controlling judiciary power? We have seen, that on the principles of general jurisprudence, a state, for the breach of a contract, may be liable for damages. A third declared object is—"to insure domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between states. These consequences will be most peaceably and effectually decided, by the establishment and by the exercise of a superintending judicial authority. By such exercise and establishment, the law of nations—the rule between contending states—will be enforced among the several states, in the same manner as municipal law.

(a) Art. 1, § 10. (b) Bract. 107.

Whoever considers, in a combined and comprehensive view, the general texture of the constitution, will be satisfied, that the people of the United States intended to form themselves into a nation, for national purposes. They instituted, for such purposes, a national government, complete in all its parts, with powers legislative, executive and judiciary; and in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully, an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, *466] be repugnant to our very existence as a nation? When *so many trains of deduction, coming from different quarters, converge and unite at last, in the same point, we may safely conclude, as the legitimate result of this constitution, that the state of Georgia is amenable to the jurisdiction of this court.[1]

But in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the constitution: it is confirmed, beyond all doubt, by the direct and explicit declaration of the constitution itself. "The judicial power of the United States shall extend, to controversies between *two* states."(*a*) Two states are supposed to have a controversy between them: this controversy is supposed to be brought before those vested with the judicial power of the United States: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two states" can be brought before a court of law; and yet neither of those states be a defendant? "The judicial power of the United States shall extend to controversies, between a state and citizens of another state." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: on the former solely, her attention is fixed: to the latter, she is, as she is painted, blind.

I have now tried this question by all the touchstones, to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of states and kingdoms; and by the

(*a*) Art III., § 2.

[1] A great political argument in favor of the federal idea of a concentration of power in the general government; but one which will never be admitted by the people of these states, in whom the doctrine of state sovereignty has been a political axiom from the foundation of the government. No wonder, that such a judicial harangue produced the 11th amendment to the constitution. The object of a state constitution is not to grant legislative power, but to confine and restrain it; whilst that of the federal constitution is to grant certain defined powers to the general government. Hence, the rule of interpretation for a state constitution differs totally from that which is applicable to the constitution of the United States; the latter instrument must have a strict construction; the former, a liberal one. Congress can pass no laws but those which the constitution authorizes, either expressly, or by clear implication; whilst the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. Therefore, the ultimate sovereignty must reside in the states, who possessed it before the formation of the Union, and still retain it, except in so far as they have voluntarily resigned the same, as to certain objects, to the federal authorities.

constitution of the United States. From all, the combined inference is, that the action lies.

CUSHING, Justice.—The grand and principal question in this case is, whether a state can, by the federal constitution, be sued by an individual citizen of another state?

The point turns not upon the law or practice of England, although, perhaps, it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the constitution established by the people of the United States; and particularly, upon the extent of powers given to the federal judiciary in the 2d section of the 3d article of the constitution. It is declared, that "the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, or treaties made or which shall be made under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies, to which the United *States shall be a party; to controversies between two or more states and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state and citizens thereof and foreign states, citizens or subjects." The judicial power, then, is expressly extended to "controversies between a state and citizens of another state." When a citizen makes a demand against a state, of which he is not a citizen, it is as really a controversy between a state and a citizen of another state, as if such state made a demand against such citizen. The case, then, seems clearly to fall within the letter of the constitution. It may be suggested, that it could not be intended to subject a state to be a defendant, because it would affect the sovereignty of states. If that be the case, what shall we do with the immediate preceding clause—"controversies between two or more states," where a state must of necessity be defendant? If it was not the intent, in the very next clause also, that a state might be made defendant, why was it so expressed, as naturally to lead to and comprehend that idea? Why was not an exception made, if one was intended? [*467

Again, what are we to do with the last clause of the section of judicial powers, viz., "controversies between a state, or the citizens thereof, and foreign states or citizens." Here again, states must be suable or liable to be made defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the United States and a foreign state, as the clause expresses, one of them must be defendant. And then, what becomes of the sovereignty of states so far as suing affects it? But although the words appear reciprocally to affect the state here and a foreign state, and put them on the same footing so far as may be, yet ingenuity may say, that the state here may sue, but cannot be sued; but that the foreign state may be sued, but cannot sue. We may touch foreign sovereignties, but not our own. But I conceive, the reason of the thing, as well as the words of the constitution, tend to show that the federal judicial power extends to a suit brought by a foreign state against any one of the United States. One design of the general government was, for managing the great affairs of peace and war and the general defence, which were impossible to be conducted,

with safety, by the states separately. Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. Thus, states at home and their citizens, and foreign states and their citizens, *468] are put together without *distinction, upon the same footing, so far as may be, as to controversies between them. So also, with respect to controversies between a state and citizens of another state (at home), comparing all the clauses together, the remedy is reciprocal; the claim to justice equal. As controversies between state and state, and between a state and citizens of another state, might tend gradually to involve states in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further, if a state is entitled to justice in the federal court, against a citizen of another state, why not such citizen against the state, when the same language equally comprehends both? The rights of individuals and the justice due to them, are as dear and precious as those of states. Indeed, the latter are founded upon the former; and the great end and object of them must be, to secure and support the rights of individuals, or else, vain is government.

But still it may be insisted, that this will reduce states to mere corporations, and take away all sovereignty. As to corporations, all states whatever are corporations or bodies politic. The only question is, what are their powers? As to individual states and the United States, the constitution marks the boundary of powers. Whatever power is deposited with the Union by the people, for their own necessary security, is so far a curtailing of the power and prerogatives of states. This is, as it were, a self-evident proposition; at least, it cannot be contested. Thus, the power of declaring war, making peace, raising and supporting armies for public defence, levying duties, excises and taxes, if necessary, with many other powers, are lodged in congress; and are a most essential abridgement of state sovereignty. Again, the restrictions upon states: "No state shall enter into any treaty, alliance or confederation, coin money, emit bills of credit, make anything but gold and silver a tender in payment of debts, pass any law impairing the obligations of contracts;" these, with a number of others, are important restrictions of the power of states, and were thought necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union. So that, I think, no argument of force can be taken from the sovereignty of states. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. If the constitution is found inconvenient in practice, in this or any other particular, it is well that a regular mode is pointed out for amendment. But while it remains, all officers, legislative, executive and judicial, both of the states and of the Union, are bound by oath to support it.

*469] *One other objection has been suggested, that if a state may be sued by a citizen of another state, then the United States may be sued by a citizen of any of the states, or, in other words, by any of their citizens. If this be a necessary consequence, it must be so. I doubt the consequence, from the different wording of the different clauses, connected

with other reasons. When speaking of the United States, the constitution says, "controversies to which the United States shall be a party," not controversies between the United States and any of their citizens. When speaking of states, it says, "controversies between two or more states; between a state and citizens of another state." As to reasons for citizens suing a different state, which do not hold equally good for suing the United States; one may be, that as controversies between a state and citizens of another state, might have a tendency to involve both states in contest, and perhaps in war, a common umpire to decide such controversies. may have a tendency to prevent the mischief. That an object of this kind was had in view, by the framers of the constitution, I have no doubt, when I consider the clashing interfering laws which were made in the neighboring states, before the adoption of the constitution, and some affecting the property of citizens of another state, in a very different manner from that of their own citizens. But I do not think it necessary to enter fully into the question, whether the United States are liable to be sued by an individual citizen? in order to decide the point before us. Upon the whole, I am of opinion, that the constitution warrants a suit against a state, by an individual citizen of another state.

A second question made in the case was, whether the particular action of *assumpsit* could lie against a state? I think *assumpsit* will lie, if any suit; provided a state is capable of contracting.

The third question respects the competency of service, which I apprehend is good and proper; the service being by summons and notifying the suit to the governor and the attorney-general; the governor, who is the supreme executive magistrate and representative of the state, who is bound by oath to defend the state, and by the constitution to give information to the legislature of all important matters which concern the interest of the state; the attorney-general, who is bound to defend the interests of the state in courts of law.

JAY, Chief Justice.—The question we are now to decide has been accurately stated, viz.: Is a state suable by individual citizens of another state?

It is said, that Georgia refuses to appear and answer to the plaintiff in this action, because she is a sovereign state, and therefore, not liable to such actions. In order to ascertain the merits *of this objection, let us inquire, 1st. In what sense, Georgia is a sovereign state. 2d. Whether [*470] suability is compatible with such sovereignty. 3d. Whether the constitution (to which Georgia is a party) authorizes such an action against her.

Suability and suable are words not in common use, but they concisely and correctly convey the idea annexed to them.

1st. In determining the sense in which Georgia is a sovereign state, it may be useful to turn our attention to the political situation we were in, prior to the revolution, and to the political rights which emerged from the revolution. All the country, now possessed by the United States, was then a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held, mediately or immediately, by grants from that crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing, or exercised here, flowed from the head of the British

Empire. They were, in strict sense, fellow-subjects, and in a variety of respects, one people. When the revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain and Spain, while Roman provinces, viz., only that affinity and social connection which result from the mere circumstance of being governed by the same prince; different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.

The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued, without interruption, to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the states, the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity,[1] established the present constitution. *471] It is remarkable, *that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We, the people of the United States, do ordain and establish this constitution." Here we see the people acting as sovereigns of the whole country; and in the language

[1] It is not to be inferred, from the language of the judges, in this and other cases, that the preamble to the constitution points to the majority of the whole people of the United States, in their aggregate collective capacity, as the original depository of the powers conferred by that instrument; the true doctrine would seem to be, that the constitution was adopted by the people of the several states, who had been previously been confederated under the name of the United States, acting through the delegates, by whom they were respectively represented in the convention which formed the constitution. Baldwin's Constitutional Views, 29–42. And see Worcester v. Georgia, 6 Pet. 569, where it is said by Judge McLean, to have been formed "by a combined power, exercised by the people, through their delegates, limited in their sanctions to the respective states. For the opposite view, see Judge Sprague's charge to the grand jury, in March 1863, during the heat of the rebellion, when the doctrine of state sovereignty was deemed a political heresy, and the expression of it, almost as an act of treason. 2 Sprague 292. But it is true, nevertheless: "the earth does move," though it may be a heresy to assert it. Even Chief Justice Agnew, of the supreme court of Pennsylvania, an ardent advocate of the federal theory, says, in Craig v. Kline, 65 Penn. St. 399, that it is a difficult problem to define the boundaries of state and federal powers; the doctrine of the rights of the states, pushed to *excess*, culminated in civil war; the rebound caused by the success of the federal arms, threatens a consolidation equally serious. The 9th and 10th amendments to the constitution expressly provide, that "the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others, retained by the people;" and that "the powers not *delegated* to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

of sovereignty, establishing a constitution by which it was their will, that the state governments, should be bound, and to which the state constitutions should be made to conform. Every state constitution is a compact made by and between the citizens of a state, to govern themselves in a certain manner; and the constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner. By this great compact, however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, &c.

If, then, it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each state in the people of each state, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former. There is reason to suspect, that some of the difficulties which embarrass the present questions, arise from inattention to differences which subsist between them.

It will be sufficient to observe briefly, that the sovereignities in Europe, and particularly in England, exist on feudal principles. That system considers the prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant, derives all franchises, immunities and privileges; it is easy to perceive, that such a sovereign could not be amendable to a court of justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the prince having all the executive powers, the judgment of the courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here; at the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African *slaves among us may be so called) and have none to govern but themselves; the citizens of [*472 America are equal as fellow-citizens, and as joint-tenants in the sovereignty.

From the differences existing between feudal sovereignties and governments founded on compacts, it necessarily follows, that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or state-sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the prince; here it rests with the people; there, the sovereign actually administers the government; here, never in a single instance; our governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

2d. The second object of inquiry now presents itself, viz., whether suability is compatible with state sovereignty.

Suability by whom? Not a subject, for in this country there are none;

not an inferior, for all the citizens being, as to civil rights, perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases, one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally sued. In this city, there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the state of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them, should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the governor and attorney-general of Delaware, as on the mayor or other officers of the corporation of Philadelphia? Will it be said, that the fifty odd thousand citizens in Delaware, being associated under a state government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a court of justice, yet that such a procedure would not comport with the dignity of the former? In this land of equal liberty, shall forty odd thousand, in one place, be compellable to do justice, and yet *473] fifty odd thousand, in *another place, be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain; and with that popular sovereignty in which every citizen partakes. Grant that the governor of Delaware holds an office of superior rank to the mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet, in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.

If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this, any one state in the Union may sue another state, in this court, that is, all the people of one state may sue all the people of another state. It is plain, then, that a state may be sued, and hence it plainly follows, that suability and state sovereignty are not incompatible. As one state may sue another state in this court, it is plain, that no degradation to a state is thought to accompany her appearance in this court. It is not, therefore, to an appearance in this court, that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a state should be sued by one citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike. Nor can I observe any greater inconveniencies in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority as an objection, at least one-half of its force is done away, by this fact, viz., that it is conceded that a state may appear in this court, as plaintiff, against a single

citizen, as defendant; and the truth is, that the state of Georgia is at this moment prosecuting an action in this court against two citizens of South Carolina. (a)

The only remnant of objection, therefore, that remains is, that the state is not bound to appear and answer as a defendant, at the suit of an individual; but why it is unreasonable that she should be so bound, is hard to conjecture: that rule is said to be a bad one, which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other states; but are not content that citizens of other states should have a right to sue them.

Let us now proceed to inquire, whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another state. This inquiry naturally *leads our attention, 1st. To the design of the constitution. 2d. To the letter and express declaration in it. [*474

Prior to the date of the constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to state judicatories, in whose institution and organization the people of the other states had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction, by whom the errors of state courts, affecting either the nation at large, or the citizens of any other state, could be revised and corrected. Each state was obliged to acquiesce in the measure of justice which another state might yield to her, or to her citizens; and that, even in cases where state considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

Prior also to that period, the United States had, by taking a place among the nations of the earth, become amenable to the law of nations; and it was their interest, as well as their duty, to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to state courts, and particularly to the courts of delinquent states, became apparent. While all the states were bound to protect each, and the citizens of each, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done to each, and the citizens of each; but also to cause justice to be done by each, and the citizens of each; and that, not by violence and force, but in a stable, sedate and regular course of judicial procedure.

These were among the evils which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

Let us now turn to the constitution. The people therein declare, that their design in establishing it, comprehended six objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To ensure domestic

(a) Georgia v. Brailsford *et al.*, *ante*, p. 402.

tranquility. 4th. To provide for the common defence. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful, to consider and trace the relations which each of these objects bears to the others; *and *475] to show that they collectively comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy: on the present occasion, such disquisitions would be unseasonable, because foreign to the subject immediately under consideration.

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the 2d section of the 3d article, where it is ordained, that the judicial power of the United States shall extend to ten descriptions of cases, viz.: 1st. To all cases arising under this constitution; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the United States; because as such laws, constitutionally made, are obligatory on each state, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognisable by national authority. 5th. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party; because in cases in which the whole people are interested, it would not be equal or wise to let any one state decide and measure out the justice due to others. 7th. To controversies between two or more states; because domestic tranquillity requires, that the contentions of states should be peaceably terminated by a common judicatory; and because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a state and citizens of another state; because, in case a state (that is, all the citizens of it) has demands against some citizens of another state, it is better that she should prosecute their demands in a national court, than in a court of the state to which those citizens belong; the danger of irritation and criminations arising from apprehensions and *suspicions of partiality, being thereby obviated. Because, in cases *476] where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid, that the latter should be the sole judges of the justice due to the latter; and true republican government requires, that free and equal citizens should have free, fair and equal justice. 9th. To controversies between citizens of the same state, claiming lands under grants of different states: because, as the rights

of the two states to grant the land, are drawn into question, neither of the two states ought to decide the controversy. 10th. To controversies between a state, or the citizens thereof, and foreign states, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people, ought to be ascertained by, and depend on national authority. Even this cursory view of the judicial powers of the United States, leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the 2d section, which extends the judicial power "to controversies between a state and citizens of another state." It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a state may be plaintiff. The ordinary rules for construction will early decide, whether those words are to be understood in that limited sense.

This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise and good, that, not only the controversies in which a state is plaintiff, but also those in which a state is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a state and citizens of another state." If the constitution really meant to extend these powers only to those controversies in which a state might be plaintiff, to the exclusion of those in which citizens had demands against a state, it is inconceivable, that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in *any part [*477 of the constitution. It cannot be pretended, that where citizens urge and insist upon demands against a state, which the state refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the constitution. What is it to the cause of justice, and how can it affect the definition of the word *controversy*, whether the demands which cause the dispute, are made by a state against citizens of another state, or by the latter against the former? When power is thus extended to a *controversy*, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists.

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: to the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one state, a right of suing individual citizens of another state, and

yet deny to those citizens a right of suing them. We find the same general and comprehensive manner of expressing the same ideas, in a subsequent clause; in which the constitution ordains, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." Did it mean here party-plaintiff? If that only was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptation, and the word party being, in common usage, applicable both to plaintiff and defendant, we cannot limit it to one of them, in the present case. We find the legislature of the United States expressing themselves in the like general and comprehensive manner; they speak in the 13th section of the judicial act, of controversies where a state is a party, and as they do not, impliedly or expressly, apply that term to either of the litigants, in particular, we are to understand them as speaking of both. In the same section, they distinguish the cases where ambassadors are plaintiffs, from those in which ambassadors are defendants, and make different provisions respecting those cases; and it is not unnatural to suppose, that they would, in like manner, have distinguished between cases where a state was plaintiff, and where a state was defendant, if they had intended to make any difference between them; or if they had apprehended that the constitution had made any difference between them.

*478] *I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: the same section of the constitution which extends the judicial power to controversies "between a state and the citizens of another state," does also extend that power to controversies to which the United States are a party. Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this, in all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a state, and the case of the United States, in very different points of view.

I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.

As this opinion, though deliberately formed, has been hastily reduced to writing, between the intervals of the daily adjournments, and while my mind was occupied and wearied by the business of the day, I fear, it is less concise and connected than it might otherwise have been. I have made no references to cases, because I know of none that are not distinguishable from this case; nor does it appear to me necessary to show that the senti-

ments of the best writers on government and the rights of men, harmonise wtih the principles which direct my judgment on the present question. The acts of the former congresses, and the acts of many of the state conventions, are replete with similar ideas; and to the honor of the United States, it may be observed, that in no other country are subjects of this kind better, if so well, understood. The attention and attachment of the constitution to the equal rights of the people are discernible in almost every sentence of it; and it is to be regretted that the provision in it which we have been considering, has not, in every instance, received the approbation and acquiescence which it merits. Georgia has, in strong language, advocated the cause of republican equality: and there is reason to *hope, that the people of that state will yet perceive that it would not have been [*479 consistent with that equality, to have exempted the body of her citizens from that suability, which they are at this moment exercising against citizens of another state.

For my own part, I am convinced, that the sense in which I understand and have explained the words "controversies between states and citizens of another state," is the true sense. The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice, without respect of persons, and by securing individual citizens, as well as states, in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It is useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring state; because it obviates occasions of quarrels between states on account of the claims of their respective citizens; because it recognises and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice, without any danger of being overborne by the weight and number of their opponents; and because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently, that fellow-citizens and joint-sovereigns cannot be degraded, by appearing with each other, in their own courts, to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of constitutional law and government can ensure the continuance and enjoyment of them.

For the reasons before given, I am clearly of opinion, that a state is suable by citizens of another state; but lest I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, viz.: That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say, that an individual may sue a state on bills of credit issued before the constitution was established, and which were issued and received on the faith of the state, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.

The following order was made:—

By the Court—It is ordered, that the plaintiff in this cause do file his declaration on or before the first day of March next.

Ordered, that certified copies of the said declaration be served on the governor and attorney-general of the state of Georgia, on or before the first day of June next.

Ordered, that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the first day of next term, judgment by default shall be entered against the said state.(a)

AUGUST TERM, 1793.

The Court being met, a commission appointing William Paterson, one of the justices, bearing date the 4th of March 1793, was read; and he was qualified according to law.(b)

(a) In February term 1794, judgment was rendered for the plaintiff, and a writ of inquiry awarded. The writ, however, was not sued out and executed; so that this cause, and all the other suits against states, were swept at once from the records of the court, by the amendment of the federal constitution, agreeable to the unanimous determination of the judges, in Hollingsworth v. Virginia, argued at February term 1798. (3 Dall. 378.)

(b) Judge Paterson's appointment was in the room of Mr. Justice Johnson, who had resigned.

The malignant fever, which during this year, raged in the city of Philadelphia, dispersed the great body of its inhabitants, and proved fatal to thousands, interrupted, likewise, the business of the courts; and I cannot trace, that any important cause was agitated in the present term.

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